No. 88-1512-CFX
Status: GRANTED

Title: Albert J. Ferens, et ux., Petitioners
v.
John Deere Company, aka Deere & Company

Docketed:
March 15, 1989

Court: United States Court of Appeals
for the Third Circuit

Counsel for petitioner: Tucker III,Richard B.

Counsel for respondent: Sha-lock,Gary F.

Entry	Date	Note	Proceedings and Orders
1	Mar 15 1989	G	Petition for writ of certiorari filed.
2	Apr 17 1989		Brief of respondent John Deere Co. in opposition filed.
3	Apr 19 1989		DISTRIBUTED. May 11, 1989
4	May 15 1989		Petition GRANTED.
5	Jun 29 1989		Joint appendix filed.
6	Jun 29 1989		Brief of petitioners Ferens, et ux. filed.
7	Jul 31 1989		Brief of respondent John Deere Co. filed.
8	Aug 1 1989	G	Motion of Pfizer, Inc. for leave to file a brief as amicus curiae filed.
9	Aug 2 1989	G	Motion of Product Liability Advisory Council for leave to file a brief as amicus curiae filed.
10	Aug 24 1989		Record filed.
		*	5 vol. USCA 10
11	Aug 24 1989		Record filed.
		*	1 vol., USDC
12	Aug 24 1989		CIRCULATED.
14	Aug 28 1989		SET FOR ARGUMENT MONDAY, NOVEMBER 6, 1989. (3RD CASE)
13	Aug 29 1989	X	Reply brief of petitioners Ferens, et ux. filed.
15	Sep 25 1989		Motion of Pfizer, Inc. for leave to file a brief as amicus curiae GRANTED.
16	Sep 25 1989		Motion of Product Liability Advisory Council for leave to file a brief as amicus curiae GRANTED.
17	Nov 6 1989		ARGUED.

88-1512

Supreme Court, U.S.
FILED
NOV 4 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In the Supreme Court of the United States

October Term, 1988

ALBERT J. FERENS and
MARGARET L. FERENS, his wife,
Petitioners,

vs.

JOHN DEERE COMPANY, a/k/a
DEERE & COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether a district court to which a case has been transferred pursuant to 28 U.S.C. §1404(a) is obligated to apply the state law that would have been applied if there had been no transfer where the transfer is from a court having proper venue and jurisdiction and the transfer has occurred as the result of an unopposed motion by the plaintiff.

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In the
Supreme Court of the United States

October Term, 1988

No. ____

ALBERT J. FERENS, and
MARGARET L. FERENS, his wife,
Petitioners,

vs.

JOHN DEERE COMPANY, a/k/a
DEERE & COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, Albert J. Ferens and Margaret L. Ferens, his wife, respectfully pray that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on November 25, 1988.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit issued November 25, 1988, upon the rendering of the Judgment sought to be reviewed, is reported at 862 F.2d 31 and appears herein as Appendix A at page A-1. The Order of this Court entered on June 27, 1988, vacating the prior Judgment of the Third Circuit and remanding the case to the Third Circuit for further consideration is reported at ___ U.S. ___, 108 S.Ct. 2862 and appears herein as Appendix B at page A-17. The prior Opinion of the Third Circuit dated May 28, 1987, is reported at 819 F.2d 423 and appears herein as Appendix C at page A-18. The Opinion of the United States District Court for the Western District of Pennsylvania is reported at 639 F. Supp. 1484 and appears herein as Appendix D at page A-34.

STATEMENT OF JURISDICTION

The Judgment of the United States Court of Appeals for the Third Circuit sought to be reviewed was entered on November 25, 1988. The Order of the United States Court of Appeals for the Third Circuit denying the Petitioners' timely Petition For Rehearing And For Rehearing En Banc was entered on January 5, 1989. This petition for a writ of certiorari is being filed within ninety (90) days of the denial of Petitioners' Petition For Rehearing And For Rehearing En Banc. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. §1404(a) provides:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

Miss. Code Ann. §15-1-49 (1972) provides:

> All actions for which no period of limitations is prescribed shall be commenced within six years next after the cause of such action accrued, and not after.

42 Pa. C.S.A. §5524(2) (Purdon 1981) provides:

> The following actions and proceedings must be commenced within two years:
>
> • • • •
>
> (2) An action to recover damages for injuries to the person or for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another.

STATEMENT OF THE CASE

Petitioners, Albert J. Ferens and Margaret L. Ferens, are residents of Pennsylvania. In July of 1981, Mr. Ferens purchased a John Deere #6620 Combine in Uniontown, Pennsylvania, for use on his farm. The combine had been manufactured by Respondent, John Deere Company, a/k/a Deere & Company[1], a Delaware corporation with its principal place of business in Illinois. In addition to doing business in Pennsylvania, Respondent was also engaged in business in Mississippi, where it was registered with the Secretary of State and maintained a local registered agent.

On July 5, 1982, Mr. Ferens was injured in Pennsylvania while cleaning his combine. His right hand became caught in the rotating auger and was severed above the wrist.

In July of 1985 the Petitioners initiated two lawsuits against the Respondent. One lawsuit was filed in the United States District Court for the Western District of Pennsylvania alleging breaches of express and implied warranties of merchantability and fitness for use (hereinafter "the Warranty Action"), for which the applicable Pennsylvania statute of limitations was four years. *See* 13 Pa. C.S.A. §2725 (Purdon 1984) and 42 Pa. C.S.A. §5525 (Purdon 1981). The other lawsuit was filed in the United States District Court for the Southern District of Mississippi alleging negligence and strict liability in tort (hereinafter "the Tort Action"), for which the applicable Mississippi statute of limitations was six years. *See* Miss. Code Ann. §15-1-49 (1972). Federal court subject matter jurisdiction

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[1]The names of all the parties to the proceedings in the Court of Appeals are contained in the caption of the case in this Court.

for both lawsuits was based upon diversity of citizenship pursuant to 28 U.S.C. §1332.

With respect to the Tort Action, the Respondent did not object to either venue or the exercise of in personam jurisdiction over it by a Mississippi court. Instead, the Respondent filed an answer denying liability and raising various affirmative defenses.

Thereafter, on or about October 2, 1985, the Petitioners moved to transfer the Tort Action to the Western District of Pennsylvania pursuant to 28 U.S.C. §1404(a). The Respondent did not oppose the transfer; and on November 8, 1985, the motion was granted.

In the Western District of Pennsylvania the Tort Action and the Warranty Action were consolidated for all purposes. On or about February 20, 1986, the Respondent filed a motion for summary judgment as to all claims in both lawsuits, asserting that the claims raised in the Tort Action were barred by Pennsylvania's two-year statute of limitations applicable to negligence and strict liability causes of action. *See* 42 Pa. C.S.A. §5524(2) (Purdon 1981). The District Court agreed and granted summary judgment as to the Tort Action claims only. Final judgment was entered as to these claims pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.[2]

The Petitioners appealed to the United States Court of Appeals for the Third Circuit. The Third Circuit initially affirmed the District Court in a 2-1 panel decision which concluded that the United States Constitution required the application of Pennsylvania's statute of limitations no matter where the case was brought. *Ferens v. Deere & Co.*,

[2]The breach of warranty claims in the Warranty Action were stayed pending the outcome of the Petitioners' appeal.

819 F.2d 423 (3rd Cir. 1987), *vacated and remanded*, ___ U.S. ___, 108 S.Ct. 2862 (1988). However, this Court granted certiorari and vacated and remanded in light of its Opinion in *Sun Oil Co. v. Wortman*, ___U.S. ___, 108 S.Ct. 2117 (1988). *Ferens v. Deere & Co.*, ___ U.S. ___, 108 S.Ct. 2862 (1988). On remand, the Third Circuit again affirmed the District Court in a 2-1 panel decision. *Ferens v. Deere & Co.*, 862 F.2d 31 (3rd Cir. 1988). In its Opinion on remand the Court concluded that Pennsylvania's two-year statute of limitations was properly applied to bar the Petitioners' Tort Action because the Petitioners had transferred the case to Pennsylvania. The Petitioners thereafter filed a timely motion for rehearing and for rehearing en banc which was denied on January 5, 1989. Petitioners now seek the issuance of a writ of certiorari from this Court.

REASONS FOR GRANTING THE WRIT

I. The Decision Of The Third Circuit Holding That The Transferee District Court Is Not Obligated To Apply The Law Of The Transferor State When The Plaintiff Is The Moving Party Is In Conflict With This Court's Reasoning In *Van Dusen v. Barrack*

The critical issue in this case is whether the District Court in Pennsylvania was obligated to apply the state law that would have been applied if there had been no transfer and the case had been tried in the Southern District of Mississippi. It is undisputed that had the Tort Action been tried in the Southern District of Mississippi, the federal court there would have applied Mississippi's statute of limitations, Miss. Code Ann. §15-1-49 (1972); and any motion for summary judgment by the Respondent based upon a statute of limitations argument would have been denied. *See Ferens v. Deere Co.*, 862 F.2d 31, 34 (3rd Cir. 1988).[1]Accordingly, the Pennsylvania District Court's decision to apply the law of the transferee state, rather than the law of the transferor state, was fatal to the Petitioners'

[1]Mississippi treats its statute of limitations as procedural for choice of law purposes and applies it to actions brought in Mississippi even though they are otherwise governed by the substantive law of another state. *See Williams v. Taylor Machinery, Inc.*, 529 So.2d 606, 609 (Miss. 1988); *Shewbrooks v. A.C. and S., Inc.*, 529 So.2d 557, 566 (Miss. 1988); *Flick v. Cochran*, 316 So.2d 242, 246 (Miss. 1975); *Louisiana & Mississippi R. Transfer Co. v. Long*, 159 Miss. 654, 665-666, 131 So. 84, 88 (1930). *See also King v. Ohaeri, Inc.*, 861 F.2d 438, 441 (5th Cir. 1988); *Cowan v. Ford Motor Co.*, 719 F.2d 785, 786 (5th Cir 1983). In *Sun Oil Co. v. Wortman*, ___U.S. ___, 108 S.Ct. 2117, 2121 (1988), this Court recently upheld the constitutionality of such a practice. Under *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487, 496 (1941), the federal court in Mississippi would have been required to apply the choice-of-law rule of Mississippi in this diversity action, and hence to apply Mississippi's six-year statute of limitations. *See King v. Ohaeri*, 861 F.2d at 441.

Tort Action. The District Court's decision, subsequently affirmed by the Third Circuit, is inconsistent with this Court's reasoning in *Van Dusen v. Barrack*, 376 U.S. 612 (1964).

In *Van Dusen* the defendants sought to transfer to the District of Massachusetts forty wrongful death actions brought in the Eastern District of Pennsylvania by the personal representatives of certain victims of an airline accident which had occurred in Massachusetts. In interpreting the "interest of justice" portion of 28 U.S.C. §1404(a), this Court was required to determine which state law would apply if a transfer were to occur. After a careful analysis, this Court stated:

> We believe, therefore, that both the history and purposes of §1404(a) indicate that it should be regarded as a federal judicial housekeeping measure, dealing with the placement of litigation in the federal courts and generally intended, on the basis of convenience and fairness, simply to authorize a change of courtrooms. [footnote omitted]

Van Dusen v. Barrack, 376 U.S. at 636-637. Because Section 1404(a) deals only with the placement of litigation, and not with the law to be applied, the Court concluded that in cases such as the one before it,

> . . . the transferee district court must be obligated to apply the state law that would have been applied if there had been no change of venue. A change of venue under §1404(a) generally should be, with respect to state law, but a change of courtrooms. [footnote omitted]

Id., 376 U.S. at 639. *See also Cowan v. Ford Motor Co.*, 713 F.2d 100, 104 n.6 (5th Cir. 1983) (if case is transferred

on defendant's motion, Mississippi statute of limitations would still apply); *Schreiber v. Allis-Chalmers Corp.*, 611 F.2d 790, 792-793 (10th Cir. 1979) (Mississippi statute of limitations would be applied in case transferred to Kansas). *Cf. Stewart Organization, Inc. v. Ricoh Corp.*, ___ U.S. ___, 108 S.Ct. 2239, 2245 (1988) (a transfer pursuant to §1404(a) does not carry with it a change in the applicable law).

In refusing to apply the state law of the transferor state, as was required in *Van Dusen*, the Third Circuit emphasized that *Van Dusen* involved a transfer sought by the defendants and noted that this Court limited its holding in *Van Dusen* to defendant-initiated transfers. *See Ferens v. Deere & Co.*, 862 F.2d at 34-35. While it is true that this Court reserved judgment on whether the same considerations would govern a plaintiff-initiated transfer, *see Van Dusen v. Barrack*, 376 U.S. at 640, the Court's reasoning and analysis are equally compelling in requiring the application of the transferor state's law regardless of which party is seeking the transfer.

The purpose of Section 1404(a) is to allow federal civil suits to be transferred, in the interest of justice, to the most convenient forum.

> Section 1404(a) reflects an increased desire to have federal civil suits tried in the federal system at the place called for in the particular case by considerations of convenience and justice. [footnote omitted]

Van Dusen v. Barrack, 376 U.S. at 616.

> The idea behind §1404(a) is that where a "civil action" to vindicate a wrong—however brought in a court—presents issues and requires witnesses that make one District Court more convenient than another, the trial judge can, after findings, transfer the whole action to the more convenient court.

Continental Grain Co. v. Barge FBL-585, 364 U.S. 19, 26 (1960), quoted with approval in *Van Dusen v. Barrack*, 376 U.S. at 622.

This remedial purpose is available to a plaintiff as well as a defendant. *See Coffey v. Van Dorn Iron Works*, 796 F.2d 217, 219 (7th Cir. 1986); *Philip Carey Manufacturing Co. v. Taylor*, 286 F.2d 782, 784 (6th Cir.), *cert. denied*, 366 U.S. 948 (1961); 1 J. Moore, Moore's Federal Practice, ¶0.145[4.-2] (2d ed. 1988). Nothing in Section 1404(a) provides for a change of the applicable law when the case is transferred by a plaintiff rather than a defendant. The section simply provides for a change of venue "[f]or the convenience of parties and witnesses, in the interest of justice." 28 U.S.C. §1404(a).

> There is nothing . . . in the language or policy of §1404(a) to justify its use by defendants to defeat the advantages accruing to plaintiffs who have chosen a forum which, although it was inconvenient, was a proper venue.

Van Dusen v. Barrack, 376 U.S. at 633-634.

> [The] legislative background [of §1404(a)] supports the view that §1404(a) was not designed to narrow the plaintiff's venue privilege or to defeat the state-law advantages that might accrue from the exercise of this venue privilege but rather the provision was simply to counteract the inconveniences that flowed from the venue statutes by permitting transfer to a convenient federal court. The legislative history of §1404(a) certainly does not justify the rather startling conclusion

that one might "get a change of law as a bonus for a change of venue." [footnote omitted]

Id., 376 U.S. at 635-636.

In the present case the Petitioners selected the Southern District of Mississippi as their forum for the Tort Action, thereby obtaining the state-law advantage of Mississippi's six-year statute of limitations. There is no question but that the Southern District of Mississippi was an appropriate forum for the Tort Action.[4] The subsequent transfer of the Tort Action to the Western District of Pennsylvania pursuant to the Petitioners' unopposed motion to

[4]The Respondent never challenged either venue or the exercise of in personam jurisdiction over it by the District Court in Mississippi; and, indeed, any such challenge would clearly have been unsuccessful. Venue over a corporation is appropriate in any judicial district in which the corporation is licensed to do business or is doing business. *See* 28 U.S.C. §1391. In its answer in the Tort Action, the Respondent admitted that it was doing business in Mississippi, was registered with the Secretary of State of Mississippi, and maintained a local registered agent in Jackson, Mississippi. Mississippi law at the time provided that a foreign corporation doing business in Mississippi was subject to suit in Mississippi to the same extent that Mississippi corporations were, regardless of whether the cause of action accrued in Mississippi or not. *See* Miss. Code Ann. §79-1-27 (1972) (repealed effective January 1, 1988). *See also* Miss. Code Ann. §79-3-229 (1972) (repealed effective January 1, 1988). In *S.& W. Construction Co. v. Douglas*, 244 Miss. 498, 506, 142 So.2d 33, 34 (1962) the Mississippi Supreme Court held that under Mississippi law, a Mississippi state court had jurisdiction to hear a case involving a nonresident plaintiff injured in another state suing a foreign corporation which, however, had qualified to do business in Mississippi and had appointed a resident agent for service of process. *See also Williams v. Taylor Machinery, Inc.*, 529 So.2d at 608-609; *Shewbrooks v. A.C. and S., Inc.*, 529 So.2d at 559; *Poole v. Mississippi Publishers Corp.*, 208 Miss. 364, 380, 44 So.2d 467, 473 (1950); *Cowan v. Ford Motor Co.*, 694 F.2d 104, 105-106 (5th Cir. 1982); *Schreiber v. Allis-Chalmers Corp.*, 611 F.2d at 793.

transfer[5] cannot be used by the Respondent to defeat the advantages accruing to the Petitioners from their proper exercise of the privilege of selecting a forum. No change of law can result from the change of venue. To hold otherwise, as the Third Circuit did, is to ignore this Court's admonition that the federal courts should "ensure that the 'accident' of federal diversity jurisdiction does not enable a party to utilize a transfer to achieve a result in federal court which could not have been achieved in the courts of the State where the action was filed." *Van Dusen v. Barrack*, 376 U.S. at 638.

The Petitioners' Tort Action would not have been barred by the statute of limitations in the courts of Mississippi where it was filed. The Respondent cannot be permitted to utilize the transfer to Pennsylvania, which was

[5]There is no question but that the Tort Action met the statutory requirements for a transfer pursuant to 28 U.S.C. §1404(a) because the transfer was clearly for the convenience of the parties and witnesses and in the interest of justice. As the affidavit accompanying the Petitioners' motion for a change of venue demonstrated, all witnesses with any knowledge of the accident or injuries resided in the Western District of Pennsylvania and all documents relating to the injuries were also located there. The Respondent filed no counter affidavit claiming any inconvenience or prejudice from a transfer to Pennsylvania. In fact, the transfer also convenienced the Respondent because both parties would be able to reduce their legal expenses by consolidating the Tort Action and the Warranty Action which were based on essentially one set of facts. The "interest of justice" component of a Section 1404(a) transfer analysis relates to the efficient administration of the court system. *Coffey v. Van Dorn Iron Works*, 796 F.2d at 221. In the present case the ability to consolidate the two lawsuits and to have the case tried by a federal judge familiar with the applicable substantive law of Pennsylvania also favored transferring the case to Pennsylvania. Cf. *Van Dusen v. Barrack*, 376 U.S. at 643-646; *Coffey v. Van Dorn Iron Works*, 796 F.2d at 221. Thus, a transfer was unquestionably appropriate under 28 U.S.C. §1404(a). Of course, since the Respondent did not oppose the Petitioners' motion for a change of venue or seek review of the transfer order, the propriety of the transfer order is not in issue.

accomplished for the convenience of the parties and witnesses and in the interest of justice, to achieve a different result.

In holding to the contrary, the majority in the Third Circuit apparently based its decision on its perception that the Petitioners' actions constituted impermissible forum shopping. As this Court recognized in *Van Dusen*, however, federal law gives a plaintiff the right to select the forum with the most favorable law so long as it is a proper forum in which the case may be brought. *See Van Dusen v. Barrack*, 376 U.S. at 633-635; *Ferens v. Deere & Co.*, 862 F.2d at 35. Both jurisdiction and venue were undeniably proper in the Southern District of Mississippi; and the Petitioners were, therefore, clearly entitled to select Mississippi as their forum and gain the advantages of that state's favorable laws.[6] The Petitioners' proper exercise of their right to select a favorable forum cannot constitute improper forum shopping.

Nor was their motion to transfer improper forum shopping. Forum shopping necessarily implicates some attempt to select a forum with a more favorable procedural or substantive law. *See Ferens v. Deere & Co.*, 862 F.2d at 37 (Seitz, J., Dissenting). The Petitioners, however, had already obtained the advantage of the most favorable law by properly selecting Mississippi as their forum. The Petitioners could have proceeded to trial on the merits in Mississippi without being barred by the statute of limitations. Their transfer of the case to Pennsylvania provided them with no better law, either procedurally or substantively.

[6]Indeed, as Judge Seitz recognized in his dissent, the Petitioners had no choice but to file suit in Mississippi because of the pertinent statutes of limitations. *See Ferens v. Deere & Co.*, 862 F.2d at 37 (Seitz, J., Dissenting).

Rather, it simply made the trial of the case more convenient for all the parties and witnesses and a more efficient utilization of judicial resources. Providing for the trial of the case in a more convenient forum is the very purpose for which 28 U.S.C. §1404(a) was enacted. Its use by the Petitioners for that very purpose, when the resulting transfer did not provide them with a more advantageous law, cannot under any circumstances be construed as inappropriate forum shopping.[7]

II. The Decision Of The Third Circuit Holding That The Transferee District Court Is Not Obligated To Apply The Law Of The Transferor State When The Plaintiff Is The Moving Party Is In Conflict With The Reasoning In Decisions From Other Circuit Courts Of Appeal

Not only is the decision of the majority in *Ferens* in conflict with the reasoning of this Court in *Van Dusen*, it is also in conflict with the reasoning in decisions from other circuit courts of appeal. Other circuit courts which have addressed the issue of the applicable law following a plaintiff-initiated transfer under Section 1404(a) have concluded that, where the transferor district court was a proper forum, the law of the transferor state should continue to apply after the transfer. *See Martin v. Stokes*, 623 F.2d 469, 471 (6th Cir. 1980); *Roofing & Sheet Metal Services, Inc. v. LaQuinta Motor Inns, Inc.*, 689 F.2d 982, 991 n.14 (11th

[7]It is instead the rule announced by the majority in *Ferens* which will result in a plaintiff's being able to use 28 U.S.C. §1404(a) as a forum shopping device to obtain the application of more favorable law. As the majority acknowledges, its construction of Section 1404(a) will allow a less diligent plaintiff who has filed his lawsuit in a forum with less favorable law to utilize Section 1404(a) to obtain the advantages of the more favorable law of another forum by initiating a transfer. *See Ferens v. Deere & Co.*, 862 F.2d at 36.

Cir. 1982). *Cf. Gonzales v. Volvo of America Corp.*, 734 F.2d 1221, 1224 (7th Cir. 1984), *superseded*, 752 F.2d 295 (7th Cir. 1985).[8]

Martin v. Stokes, *supra*, contains a comprehensive review of the applicable law following transfers under both 28 U.S.C. §1404(a) and its companion section, 28 U.S.C. §1406(a), governing transfers where venue is improper. The Court concluded that the applicable law following a transfer does not depend on whether the transfer is made on the motion of the plaintiff or defendant but does depend upon whether the transfer is pursuant to Section 1404(a) or Section 1406(a). *Id.*, 623 F.2d at 471. In reaching this conclusion, the Court reasoned as follows:

> By determining the choice of law solely on the basis of the nature of the transfer, a result is reached that is consistent both with *Van Dusen* and the *Erie* doctrine. Once a plaintiff has exercised his choice of forum by selecting a permissible forum, the state law of that forum should govern the action, regardless of the wisdom of the plaintiff's selection. Thus, no matter who seeks to transfer the action to a more convenient forum under §1404(a), the state law of the forum in which the action was originally commenced remains

[8]The *Gonzales* case involved a plaintiff-initiated transfer pursuant to 28 U.S.C. §1404(a). In its original opinion the Court, citing *Martin v. Stokes*, *supra*, and *Roofing & Sheet Metal Services, Inc. v. LaQuinta Motor Inns, Inc.*, *supra*, held that when a plaintiff has exercised his choice of forum in the first instance by selecting a permissible forum, the state law of that forum should govern the action regardless of which party initiates a transfer. 734 F.2d at 1224. However, the Court subsequently issued a second opinion superseding its original opinion and deciding the case on other grounds. 752 F.2d 295. Consequently, the question of the effect on the applicable law of a plaintiff-initiated transfer under Section 1404(a) is unresolved in the Seventh Circuit. *Coffey v. Van Dorn Iron Works*, 796 F.2d at 221 n.6.

> controlling. In this manner, the outcome in the transferee district court will be the same as the outcome would have been in the state courts of the state where the action was originally brought.
>
> Accordingly, we conclude that the choice of law is dependent on the nature of the transfer. If an action is transferred under §1404(a), the state law of the transferor court should be applied.

Id., 623 F.2d at 473.[9] *See also In re Air Crash Disaster at Washington, D.C. on January 13, 1982*, 559 F. Supp. 333, 340 n.5 (D.D.C. 1983); *In re Richardson-Merrell, Inc.*, 545 F. Supp. 1130, 1135 (S.D. Ohio 1982), *aff'd*, 727 F.2d 608 (6th Cir. 1984); *Alexander v. Richardson-Merrell, Inc.*, 541 F. Supp. 93, 99 (S.D.N.Y. 1982); 1 J. Moore, Moore's Federal Practice, ¶0.145 [4.-5] (2d ed. 1988); Note, *Choice of Law in Federal Courts after Transfer of Venue*, 63 Cornell L. Rev. 149, 154-158 (1977).

The Ninth Circuit, without reference to whether the transfer was initiated by the plaintiff or the defendant, has simply concluded that where a case is transferred for the convenience of the parties pursuant to Section 1404(a), the transferee court must apply the law of the transferor court. *See Nelson v. International Paint Co.*, 716 F.2d 640, 643 (9th Cir. 1983). *See also Ross v. Colorado Outward Bound School, Inc.*, 822 F.2d 1524, 1527 (10th Cir. 1987); *Manley v. Engram*, 755 F.2d 1463, 1467 n.14 (11th Cir. 1985); *Truck Insurance Exchange v. Terziaff*, 683 F. Supp. 223, 225 (D. Nev. 1988); *RPJ Sportswear, Inc. v. Xylo Tex, Ltd.*, 681 F. Supp. 225, 227 (S.D.N.Y. 1988); *Western Smelting*

[9]The Sixth Circuit also pointed out that a choice of law rule based upon which party requested the transfer could lead to improper forum shopping by a plaintiff who had brought his action in a proper forum, but one that had less favorable state law. *Id.*, 623 F.2d at 472. *See* footnote 7, *supra*.

& Metals, Inc. v. Slater Steel, Inc., 621 F. Supp. 578, 581 (N.D. Ind. 1985); *Davis v. Costa-Gavras*, 580 F. Supp. 1082, 1086 (S.D.N.Y. 1984); *Subacz v. Town Tower Motel Corp.*, 567 F. Supp. 1308, 1316 (N.D. Ind. 1983). *Cf. Bott v. American Hydrocarbon Corp.*, 441 F.2d 896, 899 (5th Cir. 1971) (where the transfer originates in a suggestion by the court and with the concurrence of the defendant and no objection by the plaintiff, the law of the transferor court is applied).

Those cases cited by the majority in *Ferens* as supporting the application of the law of the transferee court after a plaintiff-initiated transfer under Section 1404(a) involved situations where jurisdiction or venue in the transferor state appeared to be improper. *See Carson v. U-Haul Co.*, 434 F.2d 916, 918 (6th Cir. 1970)[10]; *Parham v. Edwards*, 346 F. Supp. 968, 971-972 (S.D. Ga. 1972), *aff'd per curiam*, 470 F.2d 1000 (5th Cir. 1973). Section 1404(a) applies to actions which have been brought in a permissible forum. *See Martin v. Stokes*, 623 F.2d at 471. It is therefore appropriate that the law of an *improper* transferor court not be applied after a transfer. Otherwise, a plaintiff could gain the advantage of the law of a state where he could not have maintained his lawsuit by filing the lawsuit there and then transferring it to a state where venue and jurisdiction were proper, but the law was less favorable. *See Roofing & Sheet Metal Services, Inc. v.*

[10]The *Carson* case was distinguished by the Sixth Circuit in its subsequent opinion in *Martin v. Stokes*, 623 F.2d at 472 n.4, on the basis that the transferor court lacked jurisdiction. The Court, however, also overruled any inference in *Carson* that the applicable law depended upon whether the plaintiff or the defendant was seeking the transfer. "While some authorities . . . have emphasized the importance of the party seeking the transfer, [citations omitted], we believe that the more appropriate emphasis is on the nature of the transfer." *Id.*, 623 F.2d at 472.

LaQuinta Motor Inns, Inc., 689 F.2d at 991-992; *Ellis v. Great Southwestern Corp.*, 646 F.2d 1099, 1110 (5th Cir. 1981); *Reyno v. Piper Aircraft Co.*, 630 F.2d 149, 165 (3rd Cir. 1980), *rev'd on other grounds*, 454 U.S. 235 (1981).

In the present case, however, venue and jurisdiction were *proper* in the Southern District of Mississippi. The overwhelming weight of authority recognizes that where the original forum is a proper one, a convenience transfer under Section 1404(a) should carry with it no change in the applicable law. This Court should issue a writ of certiorari in this case so that the contrary decision by the majority in *Ferens* may be reversed.

III. This Case Involves An Important Question Of Federal Law Which Should Be Settled By This Court

This Court granted certiorari in *Van Dusen* because it recognized that the case involved important questions concerning the construction and operation of a federal statute, 28 U.S.C. 1404(a). *See Van Dusen v. Barrack*, 376 U.S. at 615. One important question left open by this Court's Opinion in *Van Dusen* was whether the Court's holding should be extended to cases where the plaintiff initiates the transfer from a proper forum to a more convenient one. While most of the circuit courts which have addressed this issue have correctly concluded that the reasoning and analysis in *Van Dusen* compels the same result with respect to such plaintiff-initiated transfers, the majority in *Ferens* has now come to a contrary conclusion.

The construction and operation of 28 U.S.C. §1404(a) with respect to plaintiff-initiated transfers will have a significant impact on the functioning and administration of the federal court system. The rule announced in *Ferens* will result in the congestion of cases in districts which,

although proper as to venue and jurisdiction, have little relation to the underlying causes of action, which causes of action could more conveniently and efficiently be tried in other appropriate districts. Moreover, the chill placed upon plaintiff-initiated transfers will result in the greater likelihood of multiple lawsuits being filed and tried in different districts even though they arise out of a single set of facts.

At present, a plaintiff's ability to transfer a case from a proper forum to a more convenient proper forum, without a change in the applicable law, depends entirely upon the fortuitous location of the more convenient forum in a circuit other than the Third Circuit. This Court should issue a writ of certiorari in this case so that an important question of federal law may be finally settled and so that uniformity may be established as to the functioning of the federal court system.

CONCLUSION

For the foregoing reasons the Petitioners respectfully pray that their petition for a writ of certiorari be granted.

Respectfully submitted,

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-3595

ALBERT J. FERENS and
MARGARET L. FERENS, his wife

v.

DEERE & COMPANY,

(D.C. Civil No. 85-1534)

ALBERT J. FERENS and
MARGARET L. FERENS, his wife

v.

JOHN DEERE COMPANY, a/k/a
DEERE & COMPANY

(D.C. Civil No. 85-2725)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued: March 5, 1987
Decided May 28, 1987

On Remand from the Supreme Court of the United States

Before: GIBBONS, Chief Judge and SEITZ and ALDISERT, Circuit Judges

(Opinion filed November 25, 1988)

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OPINION OF THE COURT

GIBBONS, Chief Judge:

The present action is here on remand from the Supreme Court for reconsideration in light of *Sun Oil Co. v. Wortman*, 56 U.S.L.W. 4601 (1988). In *Ferens v. Deere & Co.*, 819 F.2d 42 (3d Cir. 1987) *vacated and remanded* 486 U.S. (1988), this court held that a Mississippi court could not apply Mississippi's statute of limitations to a tort which occurred in Pennsylvania where both plaintiffs were residents of Pennsylvania and the combine was purchased in Pennsylvania. This panel held that application of the laws of Mississippi would have been "arbitrary, fundamentally unfair, and therefore unconstitutional." *Id.* at 427. The district court determination that Pennsylvania's statute of limitations was applicable and therefore barred the action was affirmed. Because Mississippi was found to

be constitutionally obligated to apply the Pennsylvania statute of limitation, this court never addressed which forum's statute of limitations applies to the diversity action as a result of its having been filed in the Federal District Court for the Southern District of Mississippi and transferred pursuant to 28 U.S.C. § 1404(a) (1982) to the Federal Court for the Western District of Pennsylvania. Under the court's reasoning, both states and hence both district courts[1] would apply the Pennsylvania statute of limitations making it unnecessary to determine if the transferor or transferee forum's law applied following plaintiff's successful request for transfer pursuant to § 1404(a). This reasoning is inconsistent with the Supreme Court's determination in *Sun Oil Co. v. Wortman*. The Constitution does not preclude Mississippi's practice of applying its own statute of limitations to actions in its courts which are governed by the substantive law of another state. Thus, this court must address the previously undetermined question of which forum's law governs following a change of venue under 28 U.S.C. § 1404(a) which was granted pursuant to plaintiff's request. Under the circumstances of this case, we hold that the transferee forum's law applies (Pennsylvania).

Albert J. Ferens and Margaret L. Ferens brought this appeal from a summary judgment which was entered in favor of defendant, Deere & Company (Deere), in their product liability action grounded in diversity. The district court held that the action was time barred by Pennsylvania's two-year statute of limitations. *See* 42 Pa. Cons. Stat. Ann. § 5524(2) (Purdon 1981).

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1. *See Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941) (federal courts sitting in diversity actions generally apply the choice of law of the state in which they sit).

Because the action was transferred pursuant to 28 U.S.C. § 1404(a) (1982), from the Southern District of Mississippi to the Western District of Pennsylvania, the appellants contend that Mississippi's six-year statute of limitations for personal injuries governs. *See* Miss. Code Ann. § 15-1-49 (1972). We disagree. Thus we affirm the district court's judgment.

I.

The Ferenses reside in Dunbar, Fayette County, Pennsylvania. In July, 1981, Mr. Ferens purchased, for use on his farm, a John Deere Sidehill No. 6620 combine from the Uniontown Farm Equipment Company in Uniontown, Washington County, Pennsylvania. The combine was manufactured and distributed by Deere, a Delaware corporation with its principal place of business in Moline, Illinois. It had been sold by Deere to Uniontown for resale. On July 5, 1982, in Washington County, Pennsylvania, while Mr. Ferens was cleaning the combine, his right hand became enmeshed in its rotating augur and was severed above the wrist.

On July 3, 1985, the Ferenses filed Civil Action No. 85-1534 in the Western District of Pennsylvania, alleging that Deere breached certain express and implied warranties of merchantability and fitness for use, in violation of the Pennsylvania Commercial Code. *See* 13 Pa. Cons. Stat. Ann. §§ 1101-9507 (Purdon 1984). This breach of warranty action, which is still pending, seeks compensation for Mr. Ferens' personal injuries. Under Pennsylvania law, a four-year statute of limitations governs actions for breach of warranty. *See* 13 Pa. Cons. Stat. Ann. § 2725 (Purdon 1984); 42 Pa. Cons. Stat. Ann. § 5525 (Purdon 1981).

On July 25, 1985 the Ferenses also filed Civil Action No. 85-2725 in the Southern District of Mississippi, Jackson Division, seeking identical

damages as those sought in Pennsylvania for the same personal injuries suffered in the July 5, 1982 accident. In the Mississippi action, recovery was based on theories of negligence and strict liability in tort. Specifically, the Ferenses claimed that the combine was defective and that Deere failed to warn of the defects. The Ferenses chose Mississippi because Deere was qualified to do business there, having had appointed a local registered agent, as it had in many other states, and because the Mississippi statute of limitations for personal injuries is six years.[2] *See* Miss. Code Ann. § 15-1-49 (1972). The Ferenses did not allege that Deere designed or manufactured the combine in Mississippi, or that they ever set foot in that state.

After Deere filed an answer in the Mississippi action, the Ferenses made a motion, pursuant to 28 U.S.C. § 1404(a), to transfer their case to the Western District of Pennsylvania, claiming, inter alia, a) that they resided in Pennsylvania; b) that the accident occurred in Pennsylvania; c) that their claim had no connection with Mississippi; d) that a substantial number of material witnesses resided in the Western District of Pennsylvania, while none were in Mississippi; e) that a substantial number of necessary documentary exhibits were in the Western District of Pennsylvania, while none were in Mississippi; and f) that the breach of warranty action pending in the Western District of Pennsylvania, involving the same accident, presented common questions of fact and law. On November 8, 1985, the transfer motion was granted and on November 21, 1985 the breach of warranty

2. Pennsylvania has a two-year state of limitations for personal injuries. 42 Pa. Cons. Stat. Ann. § 5524(2) (Purdon 1981) which had run when this action was filed three years after the accident occurred.

action and the negligence and strict liability action were consolidated for all purposes.

On February 20, 1986, Deere made a motion for summary judgment on all claims, asserting that the Pennsylvania statute of limitations barred the negligence and strict liability claims, and that the terms of its written warranty precluded the breach of warranty claims. The district court held that, despite the fact that the negligence and strict liability action had been transferred from Mississippi, it was governed by the Pennsylvania statute of limitations. Additionally, the court held that material fact issues prevented summary judgment in the breach of warranty action. Thus, summary judgment was entered on the negligence and strict liability claims, and the court directed the entry of final judgment pursuant to Fed. R. Civ. P. 54(b). The Ferenses appealed. The breach of warranty case has been stayed pending its resolution.

On appeal, this panel determined that Mississippi courts were constitutionally required to apply Pennsylvania's statute of limitations to the present action. *Ferens v. Deere & Co.*, 819 F.2d 42 (3d Cir. 1987) vacated and remanded 486 U.S. (1988). We thus affirmed the district court determination that Pennsylvania's two-year statute of limitation barred the negligence and strict liability actions. We did not address whether the law of the transferor or transferee forum applied reasoning that the law applied would be the same in either forum. The Supreme Court granted certiorari, vacated and remanded the opinion for reconsideration in light of *Sun Oil Co. v. Wortman*, 56 U.S.L.W. 4601 (1988). This panel's determination in *Ferens v. Deere & Co.* is inconsistent with *Sun Oil*.

In *Sun Oil Co. v. Wortman*, 56 U.S.L.W. 4601 (1988), the Supreme Court held that a state court may choose to apply its own statute of limitations to claims

governed by the substantive laws of another state without violating either the full faith and credit clause or the due process clause. The Court's Opinion stated that statutes of limitations are procedural and the forum is entitled to apply its own procedural laws for choice of law purposes.[3] The Court explicitly rejected the suggestion that statutes of limitation should be treated substantively for conflict of law purposes to be consistent with their treatment for *Erie* doctrine purposes. *Id.* at 4604; *see also Guaranty Trust v. York*, 326 U.S. 99 (1945) (federal district courts sitting in diversity actions must apply the substantive law of the state in which they sit including statutes of limitation). The Supreme Court explained:

> Except at the extremes, the terms "substance" and "procedure" precisely describe very little except a dichotomy, and what they mean in a particular context is largely determined by the purposes for which the dichotomy is drawn. In the context of

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3. Justice O'Connor, joined by the Chief Justice, concurred in the determination that the forum may treat its statute of limitation as procedural and apply it to a case governed by the substantive law of another state only so long as this other state treats its statute of limitations as procedural. These concurring Justices reserved the question of whether a forum may apply its statute of limitations to a case where the governing substantive state law treats its statute of limitations as substantive. *Sun Oil v. Wortman*, 56 U.S.L.W. at 4608. This issue is not raised in the present context. Pennsylvania treats its statute of limitations as procedural. *See Butler v. Dresser Corp.*, 310 F. Supp. 1265 (W.D. Pa. 1970).

In another separate concurrence, Justices Brennan, Marshall and Blackmun concurred in the result permitting application of the forum's statute of limitations but did so through different reasoning. 56 U.S.L.W. at 4606. These Justices reasoned that conducting the litigation gave the forum sufficient procedural interests in the litigation to constitutionally permit application of the forum's statute of limitations. *Id.* at 4607. Justice Kennedy did not take part in the consideration or decision of this case.

> our *Erie* jurisprudence. [citations omitted], that purpose is to establish (within the limits of applicable federal law, including the prescribed Rules of Federal Procedure) substantial uniformity of predictable outcome between cases tried in federal court and cases tried in the State in which the federal court sits. [citations omitted] The purpose of the substance procedure dichotomy in the context of the Full Faith and Credit Clause, by contrast, is not to establish uniformity but to delineate spheres of state legislative competence.

Hence, a state may apply its own statute of limitations to an action governed by the substantive law of another state.

Mississippi treats its statute of limitations as procedural for choice of law purposes and applies it to actions even though they are otherwise governed by the substantive law of another state. *See Vick v. Cochran*, 316 So. 2d 242, 246 (Miss. 1975). This court's prior decision that the Full Faith and Credit Clause and the Due Process Clause require Mississippi courts to apply Pennsylvania's statute of limitation is inconsistent with the Supreme Court's determination in *Sun Oil Co. v. Wortmann*, supra. Thus, Mississippi state courts and federal courts sitting in diversity actions would apply the Mississippi statute of limitations to this action. This raises the question left unresolved by this panel's last decision: following plaintiff's successful request for change of venue pursuant to 28 U.S.C. § 1404(a), does the law of the transferor or transferee forum control?

II

The Ferenses position is straightforward. Under *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941), federal district courts sitting in

diversity must apply the choice-of-law rule of the state in which they sit. Thus, a Mississippi federal district court sitting in diversity would apply Mississippi's six-year statute of limitations to the present action because that is what a Mississippi state court would do. *See Vick v. Cochran*, 316 So. 2d 242 (Miss. 1975). Moreover, under *Van Dusen v. Barrack*, 376 U.S. 612 (1964), when a defendant obtains a transfer pursuant to 28 U.S.C. § 1404(a), the law of the transferor forum applies. Ferenses contend that the same rule should apply when a plaintiff obtains a transfer under § 1404(a).[4] Following from this contention, the transferee Pennsylvania federal district court in the present action should have applied the same law as the transferor Mississippi federal district court would have applied which is the same law that a Mississippi state court would have applied which is Mississippi's six year statute of limitations. We disagree.

In *Van Dusen v. Barrack*, plaintiffs, as the personal representatives of the decedents, brought 40 wrongful death actions in the Eastern District of Pennsylvania for deaths resulting from an airplane crash in Massachusetts. 376 U.S. 612 (1964). Pursuant to the defendants' request, the district court ordered these actions transferred to Massachusetts where over 100 similar actions were pending. Plaintiffs objected to the transfer because they were not legal representatives of the decedents pursuant to

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4. In *Schreiber v. Allis-Chalmers Corp.*, 611 F.2d 790 (1979), the Court of Appeals for the Tenth Circuit held that the law of the transferor forum applied in a case involving a plaintiff-initiated transfer under § 1404(a). The court simply stated that *Van Dusen v. Barrack* provided support for this position. *Id.* at 792. It did not discuss the fact that the Supreme Court explicitly limited its holding in *Van Dusen v. Barrack* to defendant initiated transfers, 376 U.S. at 640, leaving the question of plaintiff initiated transfers unresolved.

Massachusetts law. The Court of Appeals vacated the transfer order holding that it could be granted only if the plaintiffs were legal representatives under Massachusetts law. The Supreme Court granted certiorari and reinstated the transfer order. The Court held that in a case where defendant obtains a change of venue under § 1404(a), the state law of the transferor forum will govern.

In *Van Dusen*, the Supreme Court explained that § 1404(a) is designed to promote convenience. *Id.* at 634-35. Yet, federal law gives plaintiffs the right to choose the forum with the most favorable law and defendants should not be able to use § 1404(a) to defeat plaintiff's choice of law:

> There is nothing, however, in the language or policy of § 1404(a) to justify its use by defendants to defeat the advantages accruing to plaintiffs who have chosen a forum which, although it was inconvenient, was a proper venue. . . . § 1404(a) was not designed to narrow the plaintiff's venue privilege or to defeat the state-law advantages that might accrue from the exercise of this venue privilege but rather the provision was simply to counteract the inconveniences that flowed from the venue statutes by permitting transfer to a convenient federal court.

Id. at 633-35. The Supreme Court stated that § 1404(a) should not be construed to allow forum shopping. *Id.* at 636-38. Accordingly, § 1404(a) should be interpreted in a manner that promotes federal-state uniformity. *Id.*; *see also Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) (federal courts sitting in diversity apply the substantive law of the state in which they sit). While the *Erie* doctrine generally calls for uniformity between a federal court and the state courts where it sits, the *Van Dusen* situation was different. Because

the plaintiffs in *Van Dusen* had exercised their federal venue privilege to choose Pennsylvania federal court and the defendants had sought transfer to Massachusetts, the Court held that § 1404(a) should be construed to achieve uniformity between the Massachusetts federal court (transferee court) and the state courts of Pennsylvania where the action was filed. This protected plaintiff's venue choice as to law and prevented the use of § 1404(a) as a forum shopping device by defendants. Defendants were not able to use § 1404(a) in Pennsylvania's federal courts to obtain a result that they could not obtain in the state courts of Pennsylvania.

In *Ferens v. Deere & Co.*, we are faced with the same problem in a different guise: plaintiffs are attempting to use § 1404(a) to forum shop. They are time-barred from bringing their action in the state courts of Pennsylvania or directly in a diversity action in the federal courts sitting in Pennsylvania. They hope to do indirectly what they cannot do directly. They hope to use § 1404(a) and a brief stop in Mississippi to achieve a result in the federal courts of Pennsylvania that they could not achieve in the state courts of Pennsylvania. If allowed, this result would be contrary to the principles set forth in *Van Dusen*.

In *Ferens*, unlike *Van Dusen*, there is no danger of the defendant using § 1404(a) to defeat the plaintiff's federal venue privilege. In *Ferens*, the plaintiffs obtained the change of venue. In effect, the *Ferenses* choice of venue is the transferee forum, Pennsylvania.[5]

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5. The courts are not unanimous. *See Carson v. U-Haul Co.*, 434 F.2d 916, 918 (6th Cir. 1970) ("We hold only that since transfer was at the request of the plaintiffs, Georgia was no longer the forum state, Kentucky became the new forum state and its statute of limitations controlled."); *Parham v. Edwards*, 346 F. Supp. 968 (S.D. Ga. 1972) *aff'd per curiam* 470 F.2d 1000 (5th Cir. 1973). *But see Martin v. Stokes*, 623 F.2d 469 (6th Cir. 1980) (overturning *Carson v. U-Haul Co.*) (Applicable law is determined by the type of

Under these circumstances, there is no reason to depart from the goal of federal-state uniformity as set forth in *Erie*: § 1404(a) should be construed to obtain uniformity between the Pennsylvania federal courts (transferee forum) and the state courts of Pennsylvania. The Pennsylvania state courts would apply Pennsylvania's two-year statute of limitations. *See Butler v. Drovo Corp.*, 310 F. Supp. 1265 (W.D. Pa. 1970).

Applying the transferee forum's state law to plaintiff-initiated § 1404(a) transfers will prevent forum shopping by plaintiffs who hope to bootstrap the favorable law of another state into a convenient but otherwise unfavorable forum. We recognize that this construction of § 1404(a) may allow plaintiffs to correct a mistake as to which forum has the most favorable law in cases where plaintiffs initially file in a less favorable forum. *But see Mata v. Budd Company*, 44 F.R.D. 225 (E.D. Pa. 1968) (District court denied plaintiff's request for transfer to a forum where the action was not time barred because such "legal footwork" was against the "interests of justice."). Yet, allowing plaintiffs to correct a choice of venue error is less problematic than allowing plaintiffs to bootstrap favorable law into a forum. If the Ferenses'

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transfer, not the party making the motion: state law of transferor forum applies to § 1404(a) transfers; whereas, state law of transferee forum applies to § 1406(a) transfers.); *Nelson v. International Paint Co.*, 716 F.2d 640, 643 (9th Cir. 1983) (follows *Martin v. Stokes*, applicable law depends on the type of the transfer); *see also Gonzalez v. Volvo of America*, 734 F.2d 1221 (7th Cir. 1984) (choice of law of the transferor forum applies to plaintiff-initiated § 1404(a) transfers); *Schreiber v. Allis-Chalmers Corp.*, 611 F.2d 790 (10th Cir. 1979); *Schenk v. Piper Aircraft Corp.*, 377 F. Supp. 477, 480 (W.D. Pa. 1974) (Pennsylvania statute of limitations barred wrongful death action; plaintiff's request for transfer denied by district court which reasoned that transferee forum was required to apply the law of transferor forum).

construction of § 1404(a) was accepted by this court. § 1404(a) would turn the longest state statute of limitation into the federal statute of limitation to be applied in diversity cases where the plaintiffs can initially bring the action in the favorable state and subsequently transfer it to the convenient forum. The better construction of § 1404(a) is that the state law of the transferee forum applies to plaintiff-initiated transfers.

The district court held that Pennsylvania's two-year statute of limitations barred the present action. We will affirm the judgment of the district court.

SEITZ, Circuit Judge, dissenting.

I agree with the majority that, in light of *Sun Oil Co. v. Wortman*, 56 U.S.L.W. 4601 (1988), its earlier opinion imposing substantive due process limitations on a state court's application of its own statute of limitations lacks continuing vitality. The majority goes on, however, to construe the transfer statute (§404(a)) in the present context to require transferee forum's statute of limitations to be applied by the transferee court. Once again, I regretfully find myself unable to agree.

In its earlier opinion in this case, the majority, for whatever reason, did not first address the defendant's contention that the transfer statute did not require the transferee forum to apply the transferor forum's statute of limitations when the transfer motion was made by the plaintiff in the present context. Because I disagreed with the majority's resolution of the

constitutional issue, I reached and rejected the defendant's statutory position. *Ferens v. Deere & Company, et al.*, 809 F.2d 423, 427-28 (3d Cir. 1987), vacated, 108 S. Ct. 2862 (1988). I continue to believe that analysis is correct and am content to summarize those views here.

It is undisputed that when plaintiffs filed suit in the Southern District of Mississippi, it was a permissible forum insofar as personal jurisdiction and venue were concerned. When plaintiffs filed a motion in that court under section 1404(a) to transfer the action to the Middle District of Pennsylvania, they were asking, in terms of section 1404(a), that the transfer be granted "for the convenience of parties and witnesses, [and] in the interest of justice." It contains no language limiting its availability to defendants. But there is a much more important reason not to import into the transfer statute a change of law provision where a plaintiff is concerned. The objective of the transfer statute is solely trial convenience. Its use has nothing to do with change of law. *VanDusen v. Barrack*, 376 U.S. 612 (1964). The Supreme Court has made this perfectly clear by emphasizing that the sole purpose of the transfer statute is to change the courtroom. As recently as June of this year, the Supreme Court stated, albeit in a different context, that "Section 1404(a) is doubtless capable of classification as a procedural rule; and, indeed, we have so classified it in holding that a transfer pursuant to § 1404(a) does not carry with it a change in the applicable law." *Stewart Organization v. Ricoh Corp.*, 108 S. Ct. 2239, 2245 (1988).

I conclude, as I did in my earlier dissent, that section 1404(a) contains no language expressing an intent to exclude a plaintiff from invoking it. More to the point, it does not provide for a change of law when a case is transferred at the instance of a plaintiff.

Apparently, the sole justification for the majority's position seems to be that to allow a plaintiff to invoke section 1404(a) is to permit "forum shopping." The use of this epithet here does not withstand analysis. Forum shopping refers to choosing the most favorable place to bring suit, whether as a matter of substance or procedure. K. Redden & E. Veron, *Modern Legal Glossary* 283 (1980). Thus, it implicates some choice. Here plaintiffs had no choice at the time they decided to sue. Mississippi provided the only available forum given the pertinent statutes of limitations. There's was a classic Hobson's Choice. Consequently, the act of filing suit in Mississippi, the only available forum, did not constitute forum shopping as that term is usually understood.

Did the action of plaintiffs in moving for a transfer under section 1404(a) involve any form of forum shopping? Since "a transfer under 1404(a) does not carry with it a change in the applicable law," one may ask how forum shopping is even relevant. The granting of the motion did not give plaintiffs a substantive or procedural benefit they did not already have in Mississippi. *Stewart Organization, Inc. v. Ricoh Corp.*, 108 S. Ct. at 2245. Indeed, the only benefit which the plaintiffs can be said to enjoy is one that they share in common with the defendants: namely, that the litigation be conducted in the most convenient forum for those concerned.

I conclude where I began. Forum shopping is irrelevant to the objectives of the transfer statute because a transfer gives a plaintiff no procedural or substantive right he did not already possess.

I would reverse the judgment of the district court.

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Teste:

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(A.O. U.S. Courts. G.M.C. Printing, Phila., Pa. 215-568-4264)

Appendix B

In the Supreme Court of the United States

Albert J. FERENS, et ux, petitioners, v. DEERE & COMPANY. No. 87-477.

Case below, 639 F. Supp. 1484; 819 F.2d 423.

June 27, 1988. On petition for writ of certiorari to the United States Court of Appeals for the Third Circuit. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Third Circuit for further consideration in light of *Sun Oil Company v. Wortman*, 486 U.S. ___, 108 S.Ct. 2117, 99 L.Ed.2d ___ (1988).

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-3595

ALBERT J. FERENS and
MARGARET L. FERENS, his wife

v.

DEERE & COMPANY,

(D.C. Civil No. 85-1534)

ALBERT J. FERENS and
MARGARET L. FERENS, his wife

v.

JOHN DEERE COMPANY, a/k/a
DEERE & COMPANY

(D.C. Civil No. 85-2725)

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Argued: March 5, 1987
Before: GIBBONS, *Chief Judge* and SEITZ
and ALDISERT, *Circuit Judges*

(Opinion Filed: May 28, 1987)

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OPINION OF THE COURT

GIBBONS, *Chief Judge*:

Albert J. Ferens and Margaret L. Ferens appeal from a summary judgment which was entered in favor of defendant, Deere & Company (Deere), in their product liability action grounded in diversity. The district court held that the action was time barred by Pennsylvania's two-year statute of limitations. *See* 42 Pa. Cons. Stat. Ann. § 5524 (2) (Purdon 1981). Because their action was transferred pursuant to 28 U.S.C. § 1404(a)(1982), from the Southern District of Mississippi to the Western District of Pennsylvania, the Ferenses contend that the governing time limitation is Mississippi's six-year statute of limitations for personal injuries. *See* Miss. Code Ann. § 15-1-49 (1972). We affirm.

I.

The Ferenses reside in Dunbar, Fayette County, Pennsylvania. In July, 1981 Mr. Ferens purchased for use on his farm a John Deere Sidehill No. 6620 combine from the Uniontown Farm Equipment Company in Uniontown, Washington County, Pennsylvania. The combine was manufactured and distributed by Deere, a Delaware corporation with its principal place of business in Moline, Illinois and had been sold by Deere to Uniontown for resale. On July 5, 1982, in Washington County, Pennsylvania, while Mr. Ferens was cleaning the combine, his right hand became enmeshed in its rotating augur and was severed above the wrist.

On July 3, 1985 the Ferenses filed Civil Action No. 85-1534 in the Western District of Pennsylvania, alleging that Deere breached certain express and implied warranties of merchantability and fitness for use, in violation of the Pennsylvania Commercial Code. *See* 13 Pa. Cons. Stat. Ann. §§ 1101-9507 (Purdon 1984). This breach of warranty action, which is still pending, seeks compensation for Mr. Ferens' personal injuries. Under Pennsylvania law, a four-year statute of limitations governs actions for breach of warranty. *See* 13 Pa. Cons. Stat. Ann. § 2725 (Purdon 1984); 42 Pa. Cons. Stat. Ann. § 5525 (Purdon 1981).

On July 25, 1985 the Ferenses also filed Civil Action No. 85-2725 in the Southern District of Mississippi, Jackson Division, seeking identical damages as those sought in Pennsylvania for the same personal injuries suffered in the July 5, 1982 accident. In the Mississippi action, recovery was based on theories of negligence and strict liability in tort. Specifically, the Ferenses claimed that the combine was defective and that Deere failed to warn of the defects. The Ferenses chose Mississippi because Deere

was qualified to do business there, having had appointed a local registered agent, as it had in many other states, and because the Mississippi statute of limitations for personal injuries is six years.[1] *See* Miss. Code Ann. § 15-1-49 (1972). The Ferenses did not allege that Deere designed or manufactured the combine in Mississippi, or that they ever set foot in that state.

After Deere filed an answer in the Mississippi action, the Ferenses made a motion, pursuant to 28 U.S.C. § 1404(a), to transfer their case to the Western District of Pennsylvania, claiming, *inter alia*, a) that they resided in Pennsylvania; b) that the accident occurred in Pennsylvania; c) that their claim had no connection with Mississippi; d) that a substantial number of material witnesses resided in the Western District of Pennsylvania, while none were in Mississippi; e) that a substantial number of necessary documentary exhibits were in the Western District of Pennsylvania, while none were in Mississippi; and f) that the breach of warranty action pending in the Western District of Pennsylvania, involving the same accident, presented common questions of fact and law. On November 8, 1985, the transfer motion was granted and on November 21, 1985 the breach of warranty action and the negligence and strict liability action were consolidated for all purposes.

On February 20, 1986, Deere made a motion for summary judgment on all claims, asserting that the Pennsylvania statute of limitations barred the negligence and strict liability claims, and that the terms of its written warranty precluded the breach of

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[1] Pennsylvania has a two-year statute of limitations for personal injuries. 42 Pa. Cons. Stat. Ann. § 5524(2) (Purdon 1981) which had run when this action was filed three years after the accident occurred.

warranty claims. The district court held that, despite the fact that the negligence and strict liability action had been transferred from Mississippi, it was governed by the Pennsylvania statute of limitations. Additionally, the court held that material fact issues prevented summary judgment in the breach of warranty action. Thus, summary judgment was entered on the negligence and strict liability claims, and the court directed the entry of final judgment pursuant to Fed. R. Civ. P. 54(b). This appeal followed. The breach of warranty case has been stayed pending its resolution.

II.

The Feresses' position is straightforward. Under *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941), federal district courts sitting in diversity must apply the choice-of-law rule of the state in which they sit. Moreover, under *Van Dusen v. Barrack*, 376 U.S. 612 (1964), when a diversity action is transferred from one federal district court to another, the transfer does not result in the application of a new choice-of-law rule. Thus, the Feresses urge, the District Court for the Western District of Pennsylvania was obliged to apply Mississippi's choice-of-law rule with respect to the statute of limitations governing personal injury cases. The Feresses insist that Mississippi in this case would apply its own statute of limitations, and that therefore the Western District of Pennsylvania must do likewise.

The issue presented in the instant appeal, however, is not as facile as the Feresses would have us believe. Their arguments ignore the constitutional limits imposed upon the application of transferor state law. Thus, we begin with an examination of Mississippi law, which is aberrational in two respects.

First, Mississippi has adopted a highly unusual six-year statute of limitations for personal injury actions,[3] whereas most states have two-or three-year statutes of limitations for such claims. Second, the Mississippi Supreme Court has made an exceptionally uncommon interpretation of its borrowing statute. Like most jurisdictions in the United States, Mississippi has adopted a borrowing statute with respect to time limitations on actions.[4] The Mississippi version provides:

> When a cause of action has accrued in some other state or in a foreign country, and by the law of such state or country, or of some other state and country where the defendant has resided before he resided in this state, an action thereon cannot be maintained by reason of lapse of time, then no action thereon shall be maintained in this state.

Miss. Code Ann. § 15-1-65 (1972).

On its face, Mississippi's borrowing statute would seem to suggest that Mississippi would look to Pennsylvania for the limitations period governing the Feresses negligence and strict liability claims since

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[3]Only five states have six-year statutes of limitations for personal injury claims. *See* Me. Rev. Stat. Ann. tit. 14, § 752 (1964); Minn. Stat. § 541.05 (Supp. 1987); Miss. Code Ann. § 15-1-49 (1972); N.D. Cent. Code § 28-01-16 (1974); S.C. Code Ann. § 15-3-530 (Law Co-op 1977).

[4]Pennsylvania borrowing statute, for example, provides:

> The period of limitation applicable to a claim accruing outside this Commonwealth shall be either that provided or prescribed by the law of the place where the claim accrued or by the law of this Commonwealth, whichever first bars the claim.

42 Pa. Cons. Stat. Ann. § 5521 (Purdon 1981).

those claims would be time barred in Pennsylvania. Relying on the clause "where the defendant has resided before he resided in this state," however, the Mississippi Supreme Court has held that its borrowing statute "only applies where a non-resident in whose favor the statute has accrued afterward moves into this state." *Louisiana & Mississippi R. Transfer Co. v. Long*, 159 Miss. 654, 667, 131 So. 84, 88 (1930); *see also Cowan v. Ford Motor Co.*, 719 F.2d 785 (5th Cir. 1983) (applying the Mississippi Supreme Court's interpretation of § 15-1-65). Because Deere was qualified to do business in Mississippi at the time this action accrued, it would be treated as a resident of Mississippi under Mississippi law. *See Kershaw v. Sterling Drug, Inc.*, 415 F.2d 1009, 1011 (5th Cir. 1969). Thus, the Ferenses argue that because the Mississippi borrowing statute is inapplicable, Mississippi would apply its own statute of limitations, and under *Klaxon* and *Barrack* the federal courts must do likewise.

Oddly, the one federal appellate court which has confronted the anomaly of applying a Mississippi statute of limitations to an action having no nexus with that state, *Schreiber v. Allis-Chalmers Corp.*, 611 F.2d 790 (10th Cir. 1979), has applied *Klaxon* and *Barrack* in the manner which the Ferenses urge. In *Schreiber*, a Kansas plaintiff was injured in Kansas by a product manufactured by a Delaware corporation with its principal place of business in Wisconsin. After the expiration of the Kansas statute of limitations but before the expiration of the Mississippi statute, the Kansas plaintiff sued in the federal district court in Mississippi, which thereafter transferred the action, pursuant to 28 U.S.C. § 1404(a), to a federal district court in Kansas. The federal district court in Kansas refused to apply the Mississippi statute of limitations.

See 448 F. Supp. 1079 (D. Kan. 1978). The Court of Appeals for the Tenth Circuit, however, reversed, holding that *Van Dusen v. Barrack* controlled and that the Mississippi statute of limitations applied.

Although *Schreiber v. Allis-Chalmers Corp.* is precisely on point,[*] it has been severely criticized. *See* E. Scoles & P. Hay, *Conflict of Laws* 132 (1984); Martin, *Statutes of Limitations and Rationality in the Conflict of Laws*, 19 Washburn L.J. 405, 421 (1980); Grossman, *Statutes of Limitations and the Conflict of Laws: Modern Analysis*, 1980 Ariz. St. L.J. 1, 56-65. We agree with the critics that at most, *Klaxon* and *Barrack* require a federal diversity forum to apply a state choice-of-law rule which the state court could, as a matter of federal law, lawfully apply. Indeed, the *Van Dusen v. Barrack* Court expressly acknowledged as much. The Court, in rejecting the contention that a section 1404(a) transfer would result in a prejudicial change of law, observed:

> In so ruling, however, we do not and need not consider whether in all cases § 1404(a) would require the application of the law of the transferor, as opposed to the transferee State.[41]

41. We do not suggest that the application of transferor state law is free from constitutional limitations. *See, e.g., Watson v. Employers Liability Assurance Corp., Ltd.*, 348 U.S. 66,

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[*] While Deere points out that in *Barrack* and in *Schreiber* the transfer motion . . . were made by defendants, *see Barrack*, 376 U.S. at 614; *Schreiber*, 611 F.2d at 791, and that in the instant appeal the section 1404(a) motion was made by the plaintiff, *see* 15 C. Wright, A. Miller, E. Cooper, Federal Practice and Procedure, § 3846 (2d ed. 1986), our decision today does not depend on this distinction.

Hughes v. Fetter, 341 U.S. 609; *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493; *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532; *Home Ins. Co. v. Dick*, 281 U.S. 397.

Van Dusen v. Barrack, 376 U.S. at 639. Thus, the *Barrack* Court reasserted the continuing authority of those cases which, under the due process and full faith and credit clauses, have established federal limits upon aberrational state choice-of-law rules.

Moreover, the *Barrack* Court's reference to *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930), is for present purposes particularly significant. *Dick* involved a Texas state court applying Texas law to avoid the application of a contract term that barred any action on the insurance policy commenced after one year. The policy had been issued in Mexico to a Mexican citizen, covering a Mexican risk, and a Mexican loss had in fact occurred. The contract term in question was valid under Mexican law. The *Dick* court held that by applying its own longer limitation of actions policy instead of that of the jurisdiction having more significant contacts with the occurrence (Mexico), Texas violated the due process clause. *See Dick*, 281 U.S. at 408; *see also Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*, 292 U.S. 143, 149 (1934) (Mississippi courts cannot void limitation of action provision in Tennessee insurance policy).

Although both *Dick* and *Delta & Pine Land Co.* involved contracts incorporating shorter limitations than those authorized by the governing state law, those holdings are not limited to contractual situations. As Justice Brennan explained in *Allstate Insurance Co. v. Hague*, 449 U.S. 302, 310-11 (1981):

> *Dick* and *[John Hancock Mutual Life Insurance Co. v. Yates*, 299 U.S. 178 (1936)] stand for the proposition that if a State has only an insignificant contact with the parties and the occurrence or transaction, application of its law is unconstitutional. *Dick* concluded that nominal residence – standing alone – is inadequate; *Yates* held that postoccurrence change of residence to the forum State – standing alone – was insufficient to justify application of forum law.

All the cases decided by the Supreme Court after *Dick* which permitted the application of forum law over due process or full faith and credit objections involved situations in which the forum state had some contact with the case and some interest by virtue of that contact, justifying the application of the forum state's law. *See Hague*, 449 U.S. at 312-13; Martin, *Statutes of Limitations and Rationality in the Conflict of Laws*, 19 Washburn L.J. 405, 421 (1980).

The instant appeal presents the precise situation to which Justice Brennan refers in *Hague* – nominal residence, standing alone. Deere is nominally a resident of Mississippi because, in order to do business there, it has appointed a local resident agent. The lawsuit does not grow out of any business which Deere conducted in Mississippi. Mississippi has no interest in the injuries sustained by Mr. Ferens, or in the transaction by which he acquired the combine that injured him. Mississippi's contacts with the parties and the occurrence or transaction are plainly so insignificant that the application of its law would be arbitrary, fundamentally unfair, and therefore unconstitutional. *See Hague*, 449 U.S. at 312-13.

III.

Consequently, because Mississippi could not apply its own law to the Ferenses' suit against Deere if the suit were pending in a Mississippi state court, neither *Klaxon* nor *Barrack* require that a federal diversity forum do so either. Conversely, since the Ferenses are Pennsylvania residents, the injury occurred in Pennsylvania, and the combine was acquired there, Pennsylvania has substantial contacts with the occurrence, thereby rendering the application of its law neither arbitrary nor fundamentally unfair.[5] Hence, the district court did not err in rejecting the applicability of the Mississippi statute of limitations.

The judgment appealed from will therefore be affirmed.

[5]Because we hold that Mississippi could not constitutionally apply its law in this case, we have no reason to consider whether, as Deere contends, the *Van Dusen* v. *Barrack* rule applies only where a defendant makes a section 1404(a) motion. *See* note 4 *supra*.

Seitz, *Circuit Judge*, dissenting.

It is hardly original to say that hard cases make bad law. Depending on one's perspective, this case involves either skillful lawyering within established rules to obtain favorable law or unfair forum-shopping. The majority, in my view, has unwarrantedly imposed constitutional limitations on a forum's choice of law to prevent the Ferenses from gaining an advantage under the provisions of 28 U.S.C. § 1404(a).

The majority holds that it would be unconstitutional for a Mississippi state court to apply its statute of limitations in this case. In so holding, it ignores the distinction between the constitutional limitations on a forum's choice of substantive law and a forum's application of its procedural law.

The forum has traditionally applied its state's statute of limitations, regardless of what state's substantive law controlled. *See Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 778 n.10 (1984); *Scudder v. Union National Bank*, 91 U.S. (1 Otto) 406 (1875); *Ross v. Johns-Manville Corp.*, 766 F.2d 823 (3d Cir. 1985); *Loughan v. Firestone Tire & Rubber Co.*, 624 F.2d 726 (5th Cir. 1980); Restatement (Second) of Conflict of Laws § 142(2)(1971). Although most states have enacted borrowing statutes to address the problem presented in this case, I am not persuaded that this choice-of-law approach is mandated by the Constitution.

The majority opinion fails to cite any cases supporting its position that a forum's application of its statute of limitations may violate the due process clause of the Constitution. The two Supreme Court cases relied on by the majority, *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981), and *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930), address only the constitutional limits on a forum's choice of substantive

law. In *Hague*, Justice Brennan stated that "for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." 449 U.S. at 312-13. Moreover, the Court in *Dick* distinguished the case before it, which involved an attempt to apply Texas substantive law to a contractual limitation on the period in which the parties could sue, from a case in which the forum simply applied its procedural statute of limitations. 281 U.S. at 409-10.

In the absence of any Supreme Court decision disavowing the traditional rule permitting a state to apply its own statute of limitations,[1] I conclude that a Mississippi court's application of its six-year statute of limitations in cases such as the one before us would not violate due process. *See Cowan v. Ford Motor Co.*, 694 F.2d 104, 107 (5th Cir. 1982)(rejecting the contention that *Hague* and *Dick* limit Mississippi's selection of its statute of limitations).

Because I believe a Mississippi court could apply its statute of limitations in this case, I turn now to the issue whether the district court erred in applying Pennsylvania's statute of limitations to the Ferenses' tort claim. The parties agree that the Mississippi state courts would apply its six year statute of limitations in this case. *See Cowan v. Ford Motor Co.*, 719 F.2d 787 (5th Cir. 1983); *Louisiana & Mississippi R. Transfer Co. v. Long*, 159 Miss. 654, 131 So. 84 (1930). They also agree that under *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941), the federal

[1] In *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 778 n.10 (1984), the Court refused to reach the question whether the traditional choice of law rule, permitting a forum to select its statute of limitations, was limited by the due process clause.

district court in which this case was originally filed was bound to apply Mississippi's choice-of-law rules, and hence, its statute of limitations.

In *Van Dusen v. Barrack*, 376 U.S. 612 (1964), the Supreme Court held that the law of the transferor state should be applied when a defendant moves for a transfer under section 1404(a). It based this holding on two grounds. First, it stated that its holding would prevent the defendant from using section 1404(a) as a forum-shopping device. 376 U.S. at 633-636. Second, the Court concluded that under *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1934), section 1404(a) should be interpreted to "ensure that the 'accident' of federal diversity jurisdiction does not enable a party to utilize a transfer to achieve a result in federal court which could not have been achieved in the courts of the State where the action was filed." 376 U.S. at 638. The *Barrack* Court explicitly reserved the question whether the same rule should apply in cases in which the plaintiff initiated the transfer. A number of courts of appeals, however, have held that the law of the transfer state should govern regardless of which party moved for transfer if the transferor court is a proper forum in terms of venue and personal jurisdiction. *See Gonzalez v. Volvo of America Corp.*, 734 F.2d 1221, 1223-24 (7th Cir. 1984); *Nelson v. International Paint Co.*, 716 F.2d 640, 643 (9th Cir. 1983); *Martin v. Stokes*, 623 F.2d 469, 471-73 (6th Cir. 1980).

By focusing on whether the transferor court was a permissible forum rather than the identity of the party seeking the transfer, the courts have prevented improper forum-shopping by denying plaintiffs the ability to obtain advantageous state law in fora in which they could not properly maintain an action. At the same time, deciding the choice of law issue on the basis of the propriety of the plaintiff's initial forum selection complies with the requirement in *Barrack*

that a transfer from a proper forum does not "achieve a result in federal court which could not have been achieved in the courts of the State where the action was filed." 376 U.S. at 638.

In this case, there is no dispute that this case could be brought in the federal district court for the southern district of Mississippi in terms of venue and personal jurisdiction over the defendant. Because *Barrack* and the *Erie* doctrine require courts to treat a transfer under such circumstances as "just a change of courtrooms," *Martin v. Stokes*, *supra*, 623 F.2d at 472, the Mississippi statute of limitations should have been applied to the Ferenses' tort action.

The district court based its decision to apply the transferee's law on the ground that plaintiffs must demonstrate some good faith intent to proceed in the court where the action was originally filed before they can obtain the advantages of the transferor's law. Because it believed that the Ferenses had no intention of proceeding in the Mississippi federal district court, the court applied Pennsylvania's statute of limitations to the tort action.

This factual inquiry into the plaintiff's motives, however, is not justified under section 1404(a). Section 1404(a) permits both plaintiffs and defendants to initiate transfers "for the convenience of the parties." Moreover, as noted above, compliance with the *Barrack* language dictates that the law of the transferor state govern when the transferor court is a permissible forum.

There may be, as the appellees urge, good reasons to prevent clever plaintiffs from taking advantage of the transfer provisions in the way the Ferenses did in this case. Whether there should be restrictions on plaintiff-initiated transfers under section 1404(a), however, is an issue that is best left to Congress.

Federal courts should not "establish and impose upon state courts a federal choice-of-law rule." *Allstate Insurance Co. v. Hague*, *supra*, 449 U.S. at 334 (Stevens, J., concurring). As a federal court sitting in diversity, the district court of the southern district of Mississippi was bound to apply Mississippi's six-year statute of limitations. To be consistent with both *Erie* and *Barrack*, the transferee court should have applied the Mississippi statute of limitations to the Ferenses' tort action. I would therefore reverse the judgment of the district court.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Appendix D

Albert J. FERENS and Margaret L. Ferens, his wife, Plaintiffs,

v.

DEERE & COMPANY, Defendant.

Albert J. FERENS and Margaret L. Ferens, his wife, Plaintiffs,

v.

JOHN DEERE COMPANY, a/k/a Deere & Company, Defendant.

Civ. A. Nos. 85-1534, 85-2725.

United States District Court, W.D. Pennsylvania.

July 25, 1996.

Stanley V. Ostrow, William A. Pesrod, Pittsburgh, Pa., Faye Murphree James, William R. Barnett, Jackson, Miss., for plaintiffs.

Gary J. Sharlock, Sharlock, Repchock & Mahler, Pittsburgh, Pa., for defendant.

OPINION

COHILL, Chief Judge.

Presently before the Court is defendant's Motion for Summary Judgment in the above-captioned cases. Diversity jurisdiction is proper pursuant to 28 U.S.C. §1332 (1982).

Summary of Facts and Procedural History

Plaintiffs, Albert J. Ferens and Margaret L. Ferens, reside in Dunbar, Fayette County, Pennsylvania. Defendant, Deere & Co., is a Delaware corporation with its principal place of business in Moline, Illinois. Defendant Company is in the

business of manufacturing, advertising, selling and distributing combines, which are used to thresh and clean grain.

On or about July 17, 1981, Plaintiff purchased a John Deere Sidehill #9620 Combine, Serial No. 454807, which was manufactured by Defendant. Complaint, ¶4. Defendant sold the combine in question to the Uniontown Farm Equipment Company, which company thereafter sold the combine to Plaintiff for use on his farm. *Id.*, ¶6.

On or about July 5, 1982, in Washington County, Pennsylvania, while Plaintiff was cleaning the combine, his right hand was pulled into the rotating auger, thereby amputating it above the wrist. *Id.*, ¶7.

On July 3, 1985, Plaintiffs filed C.A. 85-1534 in the Western District of Pennsylvania, basing their claim on the Pennsylvania Commercial Code, 13 Pa.C.S. §§1101-9507 (Purdon 1964). Specifically, Plaintiffs alleged that the combine was expressly and/or impliedly warranted by Defendant to be merchantable and fit for the ordinary purposes for which it was used, and that Defendant breached its express and/or implied warranties since the combine was, in fact, defective.

Subsequently, on July 25, 1985, Plaintiffs filed C.A. 85-2725 in the Southern District of Mississippi, Jackson Division. That action, which was founded on the same accident whereby Plaintiff lost his right hand, sought damages which were identical to those sought in Plaintiffs' initial action; however, recovery was based on theories of negligence and strict liability under §402A and B of the Restatement (2d) of Torts. In their complaint in the subsequent action, Plaintiffs alleged that the combine was defective in and of itself, and as a result of Defendant's failure to warn of the alleged defects.

In a rather unusual procedural move, Plaintiffs then filed a motion for change of venue of the Mississippi action under 28 U.S.C. §1404(a). Plaintiffs' motion was granted on November 8, 1985 by United States Magistrate John R. Counts, III of the Southern District of Mississippi, Jackson Division, who transferred Plaintiffs' second action to the Western District of

Pennsylvania. Thereafter, by Order of this Court dated November 21, 1995, the two lawsuits were consolidated for all purposes.

Summary Judgment

Defendant has filed this Motion for Summary Judgment on the grounds that 1) the purchase order disclaimed any implied warranties of merchantability and fitness for a particular purpose, and contained an exclusion of consequential damages, and 2) Pennsylvania's two-year limitations period bars Plaintiffs' negligence and strict liability claims.

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P.56; *Anderson v. Liberty Lobby Inc.*, ___ U.S. ___, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). The moving party has the burden of proving that no genuine issue exists, *Adickes v. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970), and any doubts must be resolved in favor of the nonmoving party. *Gans v. Mundy*, 762 F.2d 338, 341 (3d Cir.1985) (quoting *Ness v. Marshall*, 660 F.2d 517, 519 (3d Cir.1981)).

The United States Supreme Court has recently stated that "[o]ne of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses . . ." *Celotex Corp. v. Catrett*, ___ U.S. ___, 106 S.Ct. 2548, ___, 91 L.Ed.2d 265 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson*, 106 S.Ct. at 2510.

Here, the motion is made by the Defendant solely on the basis of the pleadings without supporting affidavits; thus, the motion is functionally equivalent to a motion for judgment on

the pleadings under Fed.R.Civ.P. 12(c). *Schwartz v. Compagnie General Transatlantique*, 405 F.2d 270, 273 (2d Cir.1968), quoting 6 J. MOORE, MOORE'S FEDERAL PRACTICE, ¶56.02[3], at 2035. As such, all well-pleaded factual allegations of the Plaintiffs must be taken as true and all allegations of the moving party which have been denied are taken as false; conclusions of law are not deemed admitted. *Shade v. Commonwealth of Pennsylvania Dept. of Transportation*, 394 F.Supp. 1237, 1243 (M.D.Pa.1975).

1. *Disclaimer of Warranties*

Defendant claims that the purchase order conspicuously included the warranties which accompanied the sale of the combine and that it disclaimed the implied warranties of merchantability and fitness for particular purpose. In addition, Defendant emphasizes that said purchase order contained a clause excluding consequential damages. Defendant's Answer, Exhibit "A."

Plaintiffs admitted to the authenticity of the purchase order in their Reply to Defendant's Answer; however, Plaintiffs contend that the terms of the purchase order are unconscionable, amount to a contract of adhesion and are against public policy.

Under its adoption of the Uniform Commercial Code, 13 Pa.C.S. §2316 provides that warranties may be excluded or modified at the time of sale:

> §2316. Exclusion or modification of warranties
>
> . . . .
>
> (b) Implied warranties of merchantability and fitness.—Subject to subsection (c), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify an implied warranty of fitness the exclusion must be by a writing and conspicuous. . . .
>
> (c) Implied warranties in general.—Notwithstanding subsection (b)

(1) Unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," "with all faults" or other language which is common understanding calls the attention of the buyer to the exclusion of warranties and makes plain that there is no implied warranty.

(2) When the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him.

(3) An implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

. . . . .

Id. *See Thermo King Corp. v. Strick Corp.*, 407 F.Supp. 75 (W.D.Pa.), *aff'd.*, 600 F.2d 503 (3rd Cir.1979) (manufacturer's warranty card contained "conspicuous" language to exclude implied warranties).

In the present case, the purchase order provided as follows:

> The Warranty on the reverse side is a part of this contract and the following applies where permitted by law: Neither seller, John Deere Company, nor the manufacturer makes any other representations or warranties, express or implied (AND EXPRESSLY DISCLAIMS THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS) or has any obligation to the Purchaser except as provided on the reverse side.

Defendant's Answer, Exhibit "A."

On the reverse side of this purchase order, in paragraph F, the disclaimer is again set forth:

> F. NO REPRESENTATION OR IMPLIED WARRANTY.
>
> Where permitted by law, neither John Deere nor any company affiliated with it makes any warranties, representations or promises, express or implied, as to the quality or performance of its products other than those set forth above and DOES NOT MAKE ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS.

Id.

Paragraph G on the reverse side added:

> G. REMEDIES EXCLUSIVE.
>
> The only remedies the purchaser has in connection with the breach or performance of any warranty on John Deere equipment are those set forth above. In no event will the dealer, John Deere or any company affiliated with John Deere be liable for incidental or consequential damages or injuries, including, but not limited to loss of crops, loss of profits, rental or substitute equipment or other commercial loss.

In its definition of consequential damages, 13 Pa. C.S. §2715(b)(2) provides:

> (b) Consequential damages.—Consequential damages resulting from the breach of the seller include:
>
> (2) injury to person or property proximately resulting from any breach of warranty.

Id.

Plaintiffs, in support of their argument that the disclaimer of warranties and exclusion of remedies provisions are unconscionable, rely on 13 Pa.C.S. §2719(c):

> (c) Limitation of consequential damages.—Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer

goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

Id.

Whether a contract or clause is unconscionable is a question of law for the court. *Bishop v. Washington*, 331 Pa.Super. 397, 399, 480 A.2d 1088, 1094 (1984). The relevant section on unconscionability, 13 Pa. C.S. §2302, provides:

§2302. Unconscionable contract or clause

(a) Finding and authority of court.—If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may:

(1) refuse to enforce the contract,

(2) enforce the remainder of the contract without the unconscionable clause, or

(3) so limit the application of any unconscionable clause as to avoid any unconscionable result.

(b) Evidence by parties—When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

Plaintiffs argue that the above language renders Defendant's motion premature since the parties have not presented evidence on the issue of unconscionability. We agree for the following reasons.

The Pennsylvania Supreme Court has adopted the following definition of unconscionability:

> Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.

Witmer v. Exxon Corp., 495 Pa. 540, 551, 434 A.2d 1222, 1228 (1981), quoting *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C.Cir.1965). In the *Williams* case, Judge Skelly Wright summarized the factors to be considered in determining whether a contract or clause is unconscionable or not:

> Whether a meaningful choice is present in a particular case can only be determined by consideration of all the circumstances surrounding the transaction. In many cases the meaningfulness of the choice is negated by a gross inequality of bargaining power. The manner in which the contract was entered is also relevant to this consideration. Did each party to the contract, considering his obvious education or lack of it, have a reasonable opportunity to understand the terms of the contract, or were the important terms hidden in a maze of fine print and minimized by deceptive sales practices? Ordinarily, one who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered a one-sided bargain. But when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms. In such a case the usual rule that the terms of the agreement are not to be questioned should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld.
>
> In determining reasonableness or fairness, the primary concern must be with the terms of the contract considered in light of the circumstances existing when the contract was made. The test is not simple, nor can it be mechanically applied. The terms are to be considered "in the light of the general commercial background and the commercial needs of the particular trade or case."

Williams, 350 F.2d at 449-450 (footnote omitted).

In the present case, since no affidavits, interrogatories, depositions, or evidence of any sort has been submitted regarding the circumstances surrounding the transaction, we can only speculate as to whether or not the purchase order was unconscionable. Following the mandate of 13 Pa.C.S. §2302(b), we find it necessary to afford the parties a reasonable opportunity to present evidence on the "commercial setting, purpose and effect" of the disputed language in the purchase order. We note that while Plaintiff is a farmer, that alone is not indicative of his commercial standing because he may be a "small-time" farmer or he may be a large corporate farmer with thousands of acres of land. *See Purvis v. Consolidated Energy Products Co.*, 674 F.2d 217, 224 (4th Cir.1982) (Hall, J., dissenting) ("while in its broadest sense the meaning of 'commercial' could include any activity intended to yield a profit, in common parlance the term is generally associated with manufacturing or retail activities").

Once we are presented with some evidence as to whether the transaction was of a commercial or consumer nature, prior dealings between the parties, customary practice within the industry etc., we will then be able to make a determination on the issue of unconscionability. As it currently exists, however, the record is barren on that matter. Thus, Defendant's reliance on *Beckman v. Vansail-Dillworth Lincoln Mercury, Inc.*, 321 Pa.Super. 428, 468 A.2d 794 (1983) for the proposition that summary judgment should be granted is misplaced, as there, the state court had the benefit of affidavits, deposition testimony and other evidence which enabled it to render a decision that the contract clause was not unconscionable. *Id.* at 439-40, 468 A.2d at 799.

Defendant also relies on *Thermo King Corp.*, *supra*, where this Court found a similar warranty exclusion and limitation of remedy provision not to be unconscionable. However, *Thermo King* is not dispositive of this case because it indubitably involved a commercial transaction between two corporate parties. *Id.*, at 78. Moreover, unlike the situation in the case before us which involves injury to the person, *Thermo King* only involved consequential damages for the loss of $15,000 worth of cargo. *Id.* at 77. While the applicable provisions of the purchase

order here would most likely bar a claim for the loss of crops or profits resulting from a defective blade in the combine, we are not convinced that Plaintiff understood those provisions as limiting his right to bring a breach of warranty action for the loss of his hand. *Cf. Keystone Aeronautics Corp. v. R.J. Enstrom Corp.*, 499 F.2d 146 (3d Cir.1974) (contract clause must clearly and unequivocally express intent necessary to exculpate defendant from negligence or strict liability claims).

Accordingly, we will deny Defendant's Motion for Summary Judgment on Plaintiff's breach of warranty claim without prejudice. Defendant may reassert said motion, if deemed necessary, once the record becomes fully developed as set forth above. *See Webb v. Ford Motor Co.*, 76 F.R.D. 452, 456 (W.D.Pa.1977) (motion for summary judgment denied with respect to counts alleging unconscionability of dealer development arrangement since further discovery was necessary relative to motive and intent).

II. *Applicable Statute of Limitation for Plaintiffs' Tort Claims*

Our inquiry now turns to what statute of limitations governs Plaintiffs' negligence and strict liability claims. At the outset, we note that Pennsylvania has a two-year statute of limitations for injuries to the person, 42 Pa.C.S. §5524(2) (Purdon 1981), whereas Mississippi's limitation period is six years. Miss.Code Ann. §15-1-49 (1972).

As we noted earlier, Plaintiffs' tort actions were originally filed in the Southern District of Mississippi *after* Plaintiffs initiated their UCC breach of warranty claims in the Western District of Pennsylvania. Plaintiffs then transferred their tort actions from the Southern District of Mississippi to this Court pursuant to 28 U.S.C. §1404(a) which provides:

> For the convenience of the parties and witnesses, in the interest of justice, a District Court may transfer any civil action to any other district or division where it might have been brought.

Id.

In support of the transfer, Plaintiffs stressed the feasibility of consolidating their tort claims with their pending UCC claims in this District Court and raised concerns about the inconvenience and expense that would result if their second action remained in the Southern District of Mississippi. In his Affidavit In Support of Motion for Change of Venue, Albert J. Ferens admitted that:

> 6. The action against defendant, Deere & Company, in the Western District of Pennsylvania arises out of said accident which occurred on July 5, 1992, and is based on provisions of the Uniform Commercial Code.
>
> 7. The basis of the action filed against Defendant in the Southern District of Mississippi was the aforesaid July 5, 1992 accident and is based on strict liability, negligence and breach of warranty by said defendant.
>
> 8. That all witnesses with any knowledge of the accident or injuries husband-plaintiff sustained, including doctors, hospital personnel and who plaintiffs will call and use, reside in the Western District of Pennsylvania.
>
> 9. That all documents relating to the personal injuries plaintiff sustained are located in the Western District of Pennsylvania.
>
> 10. That to simultaneously pursue the Pennsylvania and Mississippi actions as separate lawsuits would be a great cost and expense to him.

Id., ¶¶6-10.

In the instant case, both parties concede that statutes of limitations are procedural and that the applicable limitation period is to be provided by the law of the forum. *See Butler v. Dravo Corp.*, 310 F.Supp. 1265 (W.D.Pa.1970); *Vick v. Cochran*, 316 So.2d 242 (Miss.1975). To prevent forum shopping and to keep lawsuits in forums which have a significant nexus and a legitimate interest in the litigation, most jurisdictions, including Pennsylvania and Mississippi, have adopted "borrowing statutes." In essence, borrowing statutes adopt as the

applicable period of limitation the statute which would have applied in the jurisdiction where the claim arose. For instance, Pennsylvania's borrowing statute provides that:

> The period of limitation applicable to a claim accruing outside this Commonwealth shall be either that provided or prescribed by the law of the place where the claim accrued or by the law of this Commonwealth, which ever first bars the claim.

42 Pa.C.S. §5521.

However, the crux of the problem in the instant case stems from Mississippi's anomalous borrowing statute which provides:

> When a cause of action has accrued in some other state or in a foreign country, and by the law of such state or country, or of some other state and country *where the defendant has resided before he resided in this state*, an action thereon cannot be maintained by reason of lapse of time, then no action thereon shall be maintained in this state.

Miss.Code Ann. §15-1-65 (1972) (emphasis added). The Mississippi Supreme Court, relying on the highlighted language above, has held that this borrowing statute "only applies where a nonresident in whose favor the statute has accrued afterward moves into this state." *Louisiana & Mississippi R. Transfer Co. v. Long*, 150 Miss. 654, 131 So. 84, 88 (1930). *See also Cowen v. Ford Motor Co.*, 719 F.2d 785 (5th Cir.1983) (applied Mississippi Supreme Court's interpretation of that state's borrowing statute). Since Defendant was registered to do business in Mississippi at the time of the accident here, Defendant would be treated as a resident under Mississippi law. *Kershaw v. Sterling Drug, Inc.*, 415 F.2d 1009, 1011 (5th Cir.1969). Relying on Mississippi's borrowing statute, Plaintiffs contend that the 6-year limitation of that forum should be applied.

We now reach the threshold question of whether the law of the transferor forum or the transferee forum should be applied. In resolving this question, we must consider whether Plaintiffs can utilize the change of venue provisions of 28 U.S.C. §1404(a) to resurrect a time-barred claim in the more convenient forum

In *Van Dusen v. Barrack*, 376 U.S. 612, 84 S.Ct. 805, 11 L.Ed.2d 945 (1964), the Supreme Court held that "where defendants seek transfer, the transferee district court must be obligated to apply the state law that would have applied if there had been no change of venue." *Id.* at 638, 84 S.Ct. at 821, 11 L.Ed. at 962. The *Van Dusen* Court pointed out that "both the history and purpose of §1404(a) indicate that it should be regarded as a federal judicial housekeeping measure, dealing with the placement of litigation in the federal courts and generally intended, on the basis of convenience and fairness, simply to authorize a change of court rooms." *Id.* at 636, 84 at 810, 11 L.Ed.2d at 916. The Court stressed that §1404(a) should not be used as a device by defendants to undermine the plaintiff's privilege of selecting "a forum which, although it was inconvenient, was a proper venue." *Id.* at 634, 84 S.Ct. 1815, 11 L.Ed.2d at 980. Moreover, the Court noted that if a change of law were concomitant with transfer, §1404(a) would become a forum shopping mechanism. *Id.* at 636, 84 S.Ct. at 819, 11 L.Ed.2d at 961. While *Van Dusen* concluded that a change of venue should normally be considered no more than a change of court rooms, the Court qualified its holding by continuing:

> In so ruling, however, we do not and need not consider whether in all cases §1404(a) would require the application of the law of the transferor, as opposed to the transferee, state. We do not attempt to determine whether, for example, the same considerations would govern if a plaintiff sought transfer under §1404(a)
>
> . . . . .

Id. at 639-640, 84 S.Ct. at 821, 11 L.Ed. at 963.

As of this moment, the Supreme court has not ruled on the issue left unanswered by *Van Dusen*, and our research has not found any controlling authority in the Court of Appeals for the Third Circuit. However, it has been suggested that a logical interpretation of the question left unanswered by *Van Dusen* is that when a plaintiff moves to transfer, the law of the transferee

state should apply, otherwise plaintiffs, as opposed to defendants, would be free to shop for inconvenient forums with longer limitation periods. *See* C. WRIGHT, LAW OF FEDERAL COURTS, §44 at 261-62 n. 35 (West 4th Ed.1983); ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (1969). *But see*, Note, *Choice of Law In Federal Court After Transfer of Venue*, 63 CORNELL L.REV. 149, 157-58 (1977). The reasoning behind the ALI view is that it will prevent plaintiffs from using transfers to carry favorable law from one forum to another. This rationale has been followed by courts in analogous situations. *Cf. Carson v. U-Haul Co.*, 434 F.2d 916 (6th Cir.1970) (plaintiff moved to transfer to forum with longer statute of limitations; defendant not amenable to process in original forum); *Parham v. Edwards*, 346 F.Supp. 908 (S.D. Ga.1972) (justice did not require transfer from original forum, with favorable limitation period to plaintiffs but no personal jurisdiction over defendants, to forum in which service had been obtained in a similar action, but where the action was barred by the limitation period); *Mate v. Budd Co.*, 44 F.R.D. 225 (E.D.Pa.1968) (plaintiff filed lawsuit in forum where statute of limitations barred action and sought to transfer to forum with favorable limitation period); Annot., 7 A.L.R.Fed. at 27-28 (1971).

Plaintiffs argue that the law of the transferee state applies only when personal jurisdiction with the defendant is lacking or venue is improper, neither of which was contested here. *See, e.g., Gonzales v. Volvo of America Corp.*, 734 F.2d 1221, 1223-24 (7th Cir.1984) (law of forum selected by plaintiff should govern regardless of which party initiates transfer to another district); *Martin v. Stokes*, 623 F.2d 460, 471 (6th Cir.1980) (same). *See also Schreiber v. Allis-Chalmers Corp.*, 611 F.2d 790 (10th Cir.1980) (similar facts, law of transferee state applied where defendant initiated transfer). However, in *Gonzales*, the court held that plaintiffs are "not permitted to capture favorable law of forums which lack personal jurisdiction over the defendant by filing suit there and then transferring the action to a state that is able to assert personal jurisdiction." *Id.* at 1224. By analogy, we believe that this reasoning should apply to the facts

before us since plaintiffs could not have originally brought their second action in the forum where it has been transferred due to the applicable limitations period. We reiterate that §1404(a) only permits the transfer of an action to a "district or division where it might have been brought." 28 U.S.C. §1404(a) (emphasis added.)

We believe that, at the very least, some measure of good faith expectation of proceeding in the court in which the complaint is filed is essential to allow Plaintiffs to avail themselves of that forum's limitation period, and the filing of a complaint which is merely a procedural ploy will not suffice. *Cf. Riley v. Kansas City Life Insurance Co.*, 620 F.2d 1250, 1254 (5th Cir.1980) (filing of complaint in transferor state was merely a procedural ploy and did not commence action for purposes of tolling the limitation period).

The fact that Plaintiffs' original lawsuit in this District Court did not include the claims which were time-barred under Pennsylvania law unequivocally establishes that Plaintiffs were seeking to maneuver around this by intentionally filing a second action in an inconvenient forum to avail themselves of that forum's longer statute of limitations and its plaintiff-oriented borrowing statute. By filing a subsequent lawsuit in the Southern District of Mississippi to take advantage of that state's six-year limitation period and then moving to transfer that action with their pending action in this District Court for purposes of convenience, consolidation and efficiency, Plaintiffs are seeking the "best of both forums." While we acknowledge the strong presumption in favor of a plaintiff's choice of forum, *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508, 67 S.Ct. 839, 843, 91 L.Ed. 1055, 1062 (1947), where a plaintiff chooses a forum which is not his home forum, his choice should be given considerably less weight. *Jordan v. Delaware & Hudson Ry. Co.*, 580 F.Supp. 907, 908 (E.D.Pa.1984). This consideration becomes especially relevant here since the matters relied on by Plaintiffs in support of their transfer were known to them well before they instituted their second lawsuit.

We believe that Plaintiff's tactics in this case amount to a judicial juggling act between forums—one with a clear interest

in the litigation and one whose interest is nominal at best. The only nexus between Plaintiffs' claims and Mississippi is that the Defendant Company is registered to conduct business there, has a designated agent for service of process in that state and actually transacts some business in Mississippi. On the other hand, Plaintiffs are residents of Pennsylvania, and the claim arose in Pennsylvania directly as a result of Defendant's having conducted business within that state. Regarding the choice of law issue, even under the "center of gravity" test adopted in *Mitchell v. Craft*, 211 So.2d 500 (Miss.1968), we find that Pennsylvania substantive law would govern this dispute.

Implicit in the holding of *Van Dusen* is the rationale that §1404(a) is simply a judicial housekeeping device to assure convenience and fairness to the parties. Further, we are mindful that a transfer under §1404(a) must be "in the interest of justice." Therefore, under the facts of this case, we refuse to allow Plaintiffs to transform §1404(a) into a device which would enable them to forum shop for a favorable limitation period. *Kaiser v. Mayo Clinic*, 280 F.Supp. 900, 907 (D.Minn.1968). Since Plaintiffs were fully aware of all the relevant facts at the time they commenced both actions, including the fact that the Southern District of Mississippi was an inconvenient forum, the " 'interest of justice' would be thwarted rather than served if this Court permitted this type of 'legal footwork'." *Matta*, 44 F.R.D. at 226-27 (citations omitted).

Accordingly, Defendant's motion for summary judgment is granted as to Plaintiffs' tort claims which are barred by the limitation period of 42 Pa.C.S. §5524(2).

Appendix E

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 86-3595

ALBERT J. FERENS and MARGARET L. FERENS,
his wife
vs.
DEERE & COMPANY
(D.C. Civil No. 85-1534)

ALBERT J. FERENS and MARGARET L. FERENS,
his wife
vs.
JOHN DEERE COMPANY,
a/k/a DEERE & COMPANY
(D.C. Civil No. 85-2725)

ALBERT J. FERENS, and MARGARET L. FERENS,
his wife,
Appellants

(D.C. Civil No. 85-1534 & 85-2725)

On Appeal From the United States District Court
For the Western District of Pennsylvania

Present: GIBBONS, *Chief Judge*, SEITZ and
ALDISERT, *Circuit Judges*

JUDGMENT ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was submitted on remand from the Supreme Court of the United States on August 8, 1988.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered September 5, 1986, be, and the same is hereby affirmed. Costs taxed against the appellants. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ SALLY MEYOS
Clerk

November 25, 1988

Appendix F

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 86-3595

ALBERT J. FERENS and
MARGARET L. FERENS, his wife

Appellants

vs.

JOHN DEERE COMPANY, a/k/a
DEERE & COMPANY

Appellee

Sur Petition for Rehearing

Present: GIBBONS, *Chief Judge*, SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, and ALDISERT,* *Circuit Judges.*

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ JOHN J. GIBBONS
Chief Judge

Dated: January 5, 1989

* As to panel rehearing only.

No. 88-1512

FILED
APR 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

ALBERT J. FERENS & MARGARET L. FERENS,
His Wife,

Petitioners,

v.

JOHN DEERE COMPANY a/k/a Deere & Company,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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OPINIONS BELOW AND JURISDICTION

Respondent is satisfied with the petitioners' presentation of the opinions below and grounds on which the jurisdiction of this Court is invoked.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to those provisions set forth in the Petition, this case involves Miss. Code Ann. § 15-1-65 (1972) which provides:

> When a cause of action has accrued in some other state or in a foreign country, and by the law of such state or country, or some other state or country where the defendant has resided before he resided in this state, an action thereon cannot be maintained by reason of lapse of time, then no action thereon shall be maintained in this state.

STATEMENT OF THE CASE

On July 5, 1982, Albert J. Ferens was injured while cleaning a combine manufactured by John Deere Company. The accident occurred on petitioners' farm in Pennsylvania. Mr. and Mrs. Ferens are Pennsylvania residents. Mr. Ferens purchased the combine in Pennsylvania. On July 3, 1985, petitioners filed an action in the United States District Court for the Western District of Pennsylvania seeking damages for Mr. Ferens' injuries based on various breach of warranty theories.

On July 25, 1985, petitioners filed an action in the United States District Court for the Southern District of

Mississippi seeking damages for the injuries sustained in the July 5, 1982 accident based on theories of negligence and strict liability. The Mississippi statute of limitations for such actions is six years. Miss. Code Ann. § 15-1-49 (1972). Pennsylvania's two year statute of limitations would have barred the petitioners' negligence and strict liability action had the action been filed there. 42 Pa. Cons. Stat. § 5524(2) (1981). Respondent filed an Answer to the Mississippi action which denied liability and raised the defense of statute of limitations. Prior to initiating any discovery or otherwise attempting to prosecute the action in Mississippi, petitioners filed a motion to transfer that action to the United States District Court for the Western District of Pennsylvania pursuant to 28 U.S.C. § 1404(a). The motion was supported by an affidavit signed by Mr. Ferens which asserted, inter alia, that:

(1) The combine was purchased in Pennsylvania and continued to be located in Pennsylvania;

(2) The accident occurred in Pennsylvania;

(3) "All witnesses with any knowledge of the accident or injuries husband-plaintiff sustained, including doctors, hospital personnel and who plaintiffs will call and use, reside in the Western District of Pennsylvania"; and

(4) "All documents relating to the personal injuries plaintiff sustained are located in the Western District of Pennsylvania."

Petitioners' motion was granted on November 8, 1985.

Following transfer the Mississippi action and the Pennsylvania action were consolidated on petitioners'

motion. Thereafter, respondent moved for summary judgment in both actions. The motion for summary judgment in the negligence and strict liability (Mississippi) action asserted that, under the particular facts of the case, proper implementation of 28 U.S.C. § 1404(a), as well as the constitutional principles enunciated in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), required application of Pennsylvania's statute of limitations. The district court granted that motion, holding that to apply Mississippi's statute of limitation would be to countenance a "judicial juggling act between forums – one with a clear interest in the litigation and one whose interest is nominal at best." 639 F. Supp. 1484, 1492 (1986). The district court denied, without prejudice, respondent's motion for summary judgment as to the breach of warranty (Pennsylvania) action.

The district court granted petitioners' motion for entry of final judgment upon less than all claims pursuant to Fed. R.C.P. 54(b). On appeal a panel of the United States Court of Appeals for the Third Circuit affirmed the district court in a 2-1 decision. The majority's opinion held that granting of summary judgment was proper because application of Mississippi's statute of limitations to a cause of action having no connection with Mississippi, apart from the fortuitous circumstance that respondent did business there, violated the Due Process, and Full Faith and Credit Clauses of the United States Constitution. The court concluded, therefore, that Mississippi's statute of limitations could not constitutionally have been applied even if the action had remained in Mississippi. The majority's opinion did not dispose of respondent's contentions that the granting of summary

judgment was also correct based on the proper implementation of 28 U.S.C. § 1404(a) and based on the constitutional constraints on federal power enunciated in *Erie R. Co. v. Tompkins*.

This Court granted certiorari, and vacated and remanded in light of its opinion in *Sun Oil Co. v. Wortman*, ___ U.S. ___, 108 S. Ct. 2117 (1988). On remand, the Third Circuit again affirmed the district court by a 2-1 panel decision. The majority opinion stated: "Under the circumstances of this case, we hold that the transferee forum's law applies (Pennsylvania)." 862 F.2d 31, 32 (3rd Cir. 1988). Petitioners' motion for rehearing and for rehearing en banc was denied on January 5, 1989.

SUMMARY OF ARGUMENT

Van Dusen v. Barrack reserved the question of whether the transferor or transferee forum's choice-of-law provisions would be applied in the case of a plaintiff-initiated transfer pursuant to 28 U.S.C. § 1404(a). *Van Dusen's* concern that § 1404(a) would be misused as a forum-shopping device supports the Third Circuit's holding that Pennsylvania's statute of limitations should be applied under the circumstances of this case. The purpose for which petitioners have attempted to utilize § 1404(a) would result in the application of that section in a manner which is contrary to the Constitution's inherent limits on federal power and the Equal Protection Clause. This Court should not interpret § 1404(a) in a manner which encourages the filing of stale claims.

The question presented by the Petition is one of first impression. The circuit court of appeals decisions upon which petitioners rely did not address the unique factual circumstances which are involved in this case. The alleged interest which petitioners assert is not of sufficient importance to justify this Court's exercise of its powers of discretionary review.

ARGUMENT

I. THE UNITED STATES CONSTITUTION, AS WELL AS SOUND JURISPRUDENTIAL POLICY CONSIDERATIONS, REQUIRE THE APPLICATION OF PENNSYLVANIA'S STATUTE OF LIMITATIONS UNDER THE PARTICULAR FACTS OF THIS CASE.

A. The Third Circuit's holding is consistent with *Van Dusen v. Barrack*.

As petitioners are compelled to acknowledge (albeit belatedly in their Petition), in *Van Dusen v. Barrack*, 376 U.S. 612 (1964) the Court explicitly reserved judgment on the question of whether the transferor forum's law would apply in the case of a plaintiff-initiated transfer pursuant to 28 U.S.C. § 1404(a): "[W]e do not and need not consider whether in all cases § 1404(a) would require the application of the law of the transferor, as opposed to the transferee, State.[41] We do not attempt to determine whether, for example, the same considerations would govern if a plaintiff sought transfer under § 1404(a) . . . ". 376 U.S. at 639-640. Footnote forty-one to the preceding passage also commented that "[w]e do not suggest that the application of transferor state law is free from constitutional limitations." *Ibid.* The multitude of issues which may arise and the varying factors to be considered in

cases not involving defendant-initiated transfers pursuant to § 1404(a) demonstrate the wisdom of the restrained approach taken in *Van Dusen*. Petitioner believes that similar caution is appropriate in the present matter and that in considering this Petition the Court should limit itself to the narrow issue which is before it.

Thus, in disposing of the Petition the Court need only consider whether the Third Circuit erred as a matter of law in holding that § 1404(a) did not mandate that the transferor forum's statute of limitations be applied where: (1) petitioners filed their tort action in Mississippi, a jurisdiction having no connection with the occurrence from which the action arose; (2) petitioners moved to transfer the action to Pennsylvania on the grounds that Pennsylvania was the forum in which all relevant facts regarding the circumstances of Mr. Ferens' accident and the injuries sustained by him could be best developed; and (3) petitioners' action would clearly have been barred by Pennsylvania's two year statute of limitations had it originally been commenced in Pennsylvania. This Court need not consider other issues such as that of which forum's law should be applied in the case of a plaintiff-initiated transfer under § 1404(a) where plaintiff's original choice of forum was improvident as well as inconvenient.

The Third Circuit's holding is supported by *Van Dusen's* concern regarding the potential use of § 1404(a) as a vehicle to allow forum-shopping: "If a change of law were in the offing, the parties might well regard the section primarily as a forum-shopping instrument." 376 U.S. at 636. Petitioners are at pains to assert that filing of

their tort action in the Southern District of Mississippi constituted permissible, rather than proscribed, forum-shopping. Although respondent deplores the Mississippi Supreme Court's unreasonable construction of that state's borrowing statute, it concedes that petitioners were within their rights in attempting to avail themselves of Mississippi's six year statute of limitations by prosecuting their tort action there. It is a far different matter, however, for petitioners to spuriously commence this action in Mississippi and then utilize § 1404(a) as a vehicle to allow them to prosecute the action in Pennsylvania where the action would have been barred under Pennsylvania's two year statute of limitations. Under the particular facts of this case Mississippi should not be treated as the forum in which petitioner's action was filed. Therefore, the Court's comments in *Van Dusen* regarding uniformity "between the federal district court which decides the case and the courts of the State in which the action was filed" (376 U.S. at 639) should not apply to the present petition. Rather, the Court's concern in *Van Dusen* about the harmful effects which might arise as the result of the "accident" of federal diversity jurisdiction in conjunction with the use of § 1404(a), support the Third Circuit's affirmance of the district court's granting of respondent's motion for summary judgment.

In *Van Dusen* the Court observed that "The legislative history of § 1404(a) certainly does not justify the rather startling conclusion that one might 'get a change of law as bonus for a change of venue.'" 376 U.S. at 635-636. Respondent respectfully submits that § 1404(a)'s legislative history also does not justify the equally startling conclusion that Congress intended to create a six year

federal statute of limitations for all common law personal injury actions where a defendant had minimum contacts with Mississippi and in which diversity jurisdiction existed. Yet the creation of such a federal statute of limitations would be precisely the effect if the Court were to embrace petitioners' arguments.

B. *Erie R. Co. v. Tompkins* and its constitutional bases mandate application of Pennsylvania's statute of limitations in the present matter.

In *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) the Court held that there was no general federal common law and that, therefore, cases in which federal jurisdiction was predicated on diversity of citizenship were to be determined in accordance with the substantive common law of the state in which the federal court hearing the case was located. In *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945) the Court utilized the so-called "outcome determinative" standard to hold that *Erie* required a district court to apply the statute of limitations of the state in which it was located. As this Court recently observed:

> "Except at the extremes, the terms 'substance' and 'procedure' precisely describe very little except a dichotomy, and what they mean in a particular context is largely determined by the purposes for which the dichotomy is drawn. In the context of our *Erie* jurisprudence, see *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), that purpose is to establish (within the limits of applicable federal law, including the prescribed Rules of Federal Procedure) substantial uniformity of predictable outcome between cases tried in a federal court and cases tried in the courts of the State in which the federal court sits. [citations omitted] The purpose of the substance-procedure dichotomy in the context of Full Faith and Credit Clause, by contrast,

> is not to establish uniformity but to delimit spheres of state legislative competence."

Wortman v. Sun Oil Co., ___U.S. ___, 108 S.Ct. at 2124 (1988).

In *Van Dusen* the Court cautioned against a "superficial" reading of *Erie*. 376 U.S. at 637. Respondent believes that the fundamental constitutional constraints which produced the holding in *Erie* compel the conclusion that application of Pennsylvania's statute of limitations was correct in the present matter. *Erie's* initial constitutional concern was that the doctrine of a general federal common law had violated the Equal Protection Clause by creating disparate results in litigation involving similarly situated parties based solely on the existence of federal diversity jurisdiction. 304 U.S. at 74-75. In the present matter such a disparate result will occur if the Court accepts petitioners' contentions. Thus, petitioners will be able to select Pennsylvania as the forum in which their lawsuit is prosecuted due solely to the fact that there is diversity of citizenship between the parties. If respondent were a Pennsylvania citizen, petitioners' only avenue of relief (other than pursuing a legal malpractice action against an attorney who may have allowed the Pennsylvania statute of limitations to lapse) would be to proceed in the state courts of Mississippi.

Moreover, probably the more significant constitutional basis for *Erie* is its view as to the Constitution's inherent limitations on federal power.

> Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a

> statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.

304 U.S. at 78. These same limitations mandate rejection of the contention that plaintiffs may utilize § 1404(a) as a vehicle to allow the prosecution of state common law claims in a forum where, but for § 1404(a), those claims would be barred by the forum's statute of limitations.

This Court recently expressed a kindred view of the constitutional limitations on federal judicial power vis-a-vis the powers of the states in *Sun Oil Co. v. Wortman*, *supra*. While *Wortman* required the vacating of the Third Circuit's original order affirming the district court's granting of summary judgment in the present matter, it by no means compelled the Third Circuit to reverse the granting of summary judgment. To the contrary, although *Wortman* was principally concerned with contentions pertaining to the Full Faith and Credit Clause, its handling of those contentions clearly supports the application of Pennsylvania's statute of limitations in this matter. Thus, in *Wortman* this Court deferred to the right of a state to apply its own statute of limitations to a matter pending in its courts. The Court expressly rejected an invitation to "embark upon the enterprise of constitutionalizing choice-of-law rules". ___U.S. ___, 108 S. Ct. at 2124. Such an enterprise, had it been embarked upon, would make the federal courts the arbiters of the applicable statute of

limitations to actions brought pursuant to state law. Petitioners' contentions, if accepted, would create a comparable role for the United States Congress based upon the enactment of § 1404(a).

C. Encouraging the prosecution of stale claims in forums where they would be time-barred but for § 1404(a) undermines the sound policy of limiting such claims.

The reasons which support the enactment of statutes of limitation – judicial economy, fairness to defendants, simplification of proof, etc. – are so well-established as to require no elaboration. Similarly, the undesirability of allowing parties to shop for a forum with a longer statute of limitations when their claim is time-barred in the forum where it arose is so well-recognized that many states (including Mississippi) have adopted so-called "borrowing statutes". Typically, borrowing statutes adopt as the applicable period of limitation that which would have applied in the jurisdiction where a cause of action arose. For example, Pennsylvania's borrowing statute provides that:

> The period of limitation applicable to a claim accruing outside this Commonwealth shall be either that provided or prescribed by the law of the place where the claim accrued or by the law of this Commonwealth, whichever first bars the claim. 42 Pa. Cons. Stat. § 5521 (1981).

The present Petition grows out of the unreasonable construction of Mississippi's borrowing statute which has been adopted by its Supreme Court. Mississippi's statute provides:

> § 15-1-65. Action barred in another jurisdiction barred here.

> When a cause of action has accrued in some other state or in a foreign country, and by the law of such state or foreign country, or of some other state or foreign country where the defendant has resided before he resided in this state, an action thereon cannot be maintained by reason of lapse of time, then no action thereon shall be maintained in this state.

The logical and grammatically sound reading of the preceding statute should lead the uninitiated to conclude that the present action would be barred in Mississippi because "[w]hen a cause of action has accrued in some other state or in a foreign country, and by the law of such state or foreign country . . . an action thereon cannot be maintained by reason of lapse of time, then no action thereon shall be maintained in this state." The Mississippi Supreme Court, however, relying on the clause omitted from the edited version set forth in the preceding sentence and inferring a comma following "some other state or foreign country", has held that this borrowing statute "only applies where a nonresident in whose favor the statute has accrued afterward moves into this state." *Louisiana & Mississippi R. Transfer Co. v. Long*, 159 Miss. 654, 131 So. 84, 88 (1930). (Respondent is not a Mississippi corporation, but is treated as having been a Mississippi resident at the time of the accrual of the present action by reason of its being qualified to do business in the state at that time. *Kershaw v. Sterling Drug, Inc.*, 415 F.2d 1009 (5th Cir. 1969).) Notwithstanding that the only plausible rationale for this construction of the statute is to provide employment to members of the Mississippi bar by allowing that state to serve as a dumping ground for stale claims, and despite the Fifth Circuit Court of Appeal's apparent hope that the construction would be

repudiated, the Mississippi Supreme Court adheres to its previous interpretation of Miss. Code Ann. § 15-1-65. *Cowan v. Ford Motor Co.*, 719 F.2d 785, 787 (5th Cir. 1983).

Petitioners predict direly: "The rule announced in *Ferens* will result in the congestion of cases in districts which, although proper as to venue and jurisdiction, have little relation to the underlying causes of action, which causes of action could more conveniently and efficiently be tried in other appropriate districts." (Petition, pp. 19-20). Whether the predicted congestion may occur is entirely speculative. Should it occur, however, respondent submits that the true cause of such congestion is the Mississippi Supreme Court which is apparently determined to change that state's nickname from "The Magnolia State" to "The Stale Claims State". See *Shewbrooks v. A.C.&S., Inc.*, 529 So.2d 557 (Miss. 1988). Although federal district courts in Mississippi may be the unfortunate victims of such judicial largesse, as a matter of policy it is infinitely preferable that such burdens be restricted to the courts of Mississippi rather than distributed throughout the country. If restricted to Mississippi, there may eventually come to exist such intolerable delays in resolution of actions arising in that state that the citizens of Mississippi will correct the situation either through their legislature or through judicial elections.

If this Court accepts petitioners' basic contention as to the proper interpretation of § 1404(a), the unquestionable result will be an increase in the filing of claims in Mississippi which are time-barred in the jurisdictions where they arose, swiftly followed by plaintiff's § 1404 (a) motion. It is unfortunate that other segments of our

nation's economy are not as efficient and well organized as its plaintiffs' bar. The strategy pursued by petitioners' counsel in the present matter was undoubtedly inspired by the Pennsylvania Bar Association's Civil Litigation Section's Practice Bulletin Number 7 "How to Save that Over Two Year Old Claim", subtitled "Applying the Mississippi Statute of Limitations a/k/a St. Jude". That publication urged Pennsylvania counsel handling superannuated tort claims to do exactly what was done by petitioners in the present matter. There is no doubt that all but the most backward practitioners would hear of a ruling in petitioners' favor by this Court and do precisely what petitioners have attempted to do in this matter. Considering the crushing burdens to which the federal district courts are already subject (which have of course produced calls for the elimination of diversity jurisdiction), respondent finds it inconceivable that this Court would apply § 1404(a) in a manner which would guarantee increased civil litigation – litigation which as a rule would be more difficult to handle than the normal case simply by virtue of its age.

Finally, if § 1404(a) were to be applied in the manner urged by petitioners, district courts in states other than Mississippi would be forced to adopt a choice-of-law approach which is contrary to the recently adopted revision of the RESTATEMENT (SECOND) OF CONFLICTS OF LAW, § 142 (Supp. 1989). The revision states:

> § 142. Statute of Limitations
>
> Whether a claim will be maintained against the defense of the statute of limitations is determined under the principles stated in § 6. In general, unless the exceptional circumstances of the case make such a result unreasonable:
>
> (1) The forum will apply its own statute of limitations barring the claim.
>
> (2) the forum will apply its own statute of limitations permitting the claim unless:
>
> (a) maintenance of the claim would serve no substantial interest of the forum; and
>
> (b) the claim would be barred under the statute of limitations of a state having a more significant relationship to the parties and the occurrence.

Although in *Wortman* this Court declined to constitutionalize the views of modern scholars, respondent believes that the Court may properly consider such views in interpreting § 1404(a).

II. THE THIRD CIRCUIT'S HOLDING DOES NOT CONFLICT WITH THE SPECIFIC HOLDINGS OF THE CIRCUIT COURT DECISIONS UPON WHICH PETITIONERS RELY.

Careful review of the circuit court of appeals decisions cited by petitioners reveals that none of those cases actually decided the precise legal question presented by the present Petition. Thus, none of those cases involved a situation in which the plaintiff filed an action for the sole apparent purpose of capturing a favorable statute of limitations and then exporting it to the forum where the cause of action arose, but where it would have been time-barred if originally filed there. *Martin v. Stokes*, 623 F.2d 469 (6th Cir. 1980) involved a defendant – initiated transfer, the probable basis for which was 28 U.S.C. § 1406(a), rather than § 1404(a). *Roofing & Sheet Metal Services, Inc. v. LaQuinta Motor Inns, Inc.*, 689 F.2d 982 (11th Cir. 1982)

presented a situation in which the district court treated the defendant's motion to dismiss for lack of personal jurisdiction and on grounds of forum non conveniens as a § 1404(a) motion. That case did not involve manipulative use of § 1404(a) by plaintiff. *Nelson v. International Paint Co.*, 716 F.2d 640 (9th Cir. 1983) applied the rule that transfer pursuant to § 1406(a) required application of the transferee forum's choice-of-law rule. The Ninth Circuit did not analyze the question of which statute of limitations should be applied in the case of a plaintiff-initiated § 1404(a) transfer, but erroneously stated in *dictum* that in all cases transferred under § 1404(a) "we must apply the law of the transferor court", misciting *Van Dusen* for that proposition. 716 F.2d at 643.

Although the cases cited by petitioners do not establish the existence of a conflict among the circuit courts of appeal such as would justify the granting of the Petition, those cases' treatment of transfers under 28 U.S.C. § 1406(a) supports to the Third Circuit's holding in this case. The courts of appeal have generally held that the transferee forum's choice-of-law rules should apply following transfer pursuant to § 1406(a) because otherwise plaintiffs could utilize § 1406(a) to capture the favorable law of the transferor forum even though the original defendant was not properly subject to that forum's personal jurisdiction. The courts have correctly refused to condone such blatant forum-shopping. Although venue and jurisdiction were technically proper in the present matter, petitioners' conduct subsequent to the original filing in Mississippi clearly demonstrates that that filing was subterfuge whose purpose was just as improper as that of a plaintiff who attempts to capture favorable law

by suing the defendant in a forum where personal jurisdiction does not exist.

III. SPECIAL AND IMPORTANT REASONS DO NOT EXIST TO JUSTIFY THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI.

The essence of petitioners' argument is that they have a right to utilize § 1404(a) to prosecute their personal injury claim in the jurisdiction where it arose, even though it would have been barred if originally filed in that jurisdiction. Respondent does not believe that this asserted right, if it exists at all, is of a magnitude sufficient to merit discretionary review by this Court. Furthermore, petitioners may yet recover against respondent in their breach of warranty action. Finally, petitioners may have, as others similarly situated to them frequently do, an avenue of recovery in the form of a legal malpractice claim against counsel who has allowed the statute of limitations to lapse without filing an action. Such conduct on the part of counsel is regarded as negligence per se in most jurisdictions and will generally result in prompt and substantial settlements being paid by professional liability insurance carriers.

CONCLUSION

For the foregoing reasons, respondent requests that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JUN 29 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1512

In The

Supreme Court of the United States

October Term, 1988

ALBERT J. FERENS and
MARGARET L. FERENS, his wife,

Petitioners,

vs.

JOHN DEERE COMPANY, a/k/a
DEERE & COMPANY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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QUESTION PRESENTED FOR REVIEW

Whether a district court to which a case has been transferred pursuant to 28 U.S.C. §1404(a) is obligated to apply the state law that would have been applied if there had been no transfer where the transfer is from a court having proper venue and jurisdiction and the transfer has occurred as the result of an unopposed motion by the plaintiff.

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Note, *Choice of Law in Federal Courts after Transfer of Venue*, 63 Cornell L. Rev. 149 (1977) 18

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No. 88-1512

In The

Supreme Court of the United States

October Term, 1988

ALBERT J. FERENS and
MARGARET L. FERENS, his wife,

Petitioners,

vs.

JOHN DEERE COMPANY, a/k/a
DEERE & COMPANY,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Third Circuit

BRIEF FOR PETITIONERS

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit issued November 25, 1988, upon the rendering of the judgment to be reviewed is reported at 862 F.2d 31 and appears in Petitioners' Petition For A Writ Of Certiorari as Appendix A at page A-1. The Order of this Court entered on June 27, 1988, vacating the previous judgment of the Third Circuit and remanding the case to the Third Circuit for further consideration is reported at ___ U.S. ___, 108 S.Ct. 2862 and appears in Petitioners' Petition For A Writ Of Certiorari as Appendix B at page A-17. The prior Opinion of the Third Circuit dated May 28, 1987, is reported at 819 F.2d 423 and appears in Petitioners' Petition For A Writ Of Certiorari as Appendix C at page A-18. The Opinion of the United States District Court for the Western District of Pennsylvania is reported at 639 F. Supp. 1484 and appears in Petitioners' Petition For A Writ Of Certiorari as Appendix D at page A-34.

STATEMENT OF JURISDICTION

The Judgment of the United States Court of Appeals for the Third Circuit was entered on November 25, 1988. The Order of the United States Court of Appeals for the Third Circuit denying the Petitioners' timely Petition For Rehearing And For Rehearing En Banc was entered on January 5, 1989. Petitioners' Petition For A Writ Of Certiorari was timely filed on March 15, 1989. The Petition was granted on May 15, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. §1404(a) provides:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

Miss. Code Ann. §15-1-49 (1972) provides:

> All actions for which no period of limitations is prescribed shall be commenced within six years next after the cause of such action accrued, and not after.

42 Pa. C.S.A. §5524(2) (Purdon 1981) provides:

> The following actions and proceedings must be commenced within two years:
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> • • • •
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> (2) An action to recover damages for injuries to the person or for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another.

STATEMENT OF THE CASE

Petitioners, Albert J. Ferens and Margaret L. Ferens, are residents of Pennsylvania (J.A. 8,13,31). In July of 1981, Mr. Ferens purchased a John Deere #6620 Combine in Uniontown, Pennsylvania, for use on his farm (J.A. 9,14,21,32). The combine had been manufactured by Respondent, John Deere Company, a/k/a Deere & Company[1], a Delaware corporation with its principal place of business in Illinois (J.A. 8,9,13,14,21). In addition to doing business in Pennsylvania, Respondent was also engaged in business in Mississippi, where it was registered with the Secretary of State and maintained a local registered agent (J.A. 13,21).

On July 5, 1982, Mr. Ferens was injured in Pennsylvania while cleaning his combine (J.A. 9,14,32). His right hand became caught in the rotating auger and was severed above the wrist (J.A. 9,14,32).

In July of 1985 the Petitioners initiated two lawsuits against the Respondent (J.A. 1,3). One lawsuit was filed in the United States District Court for the Western District of Pennsylvania alleging breaches of express and implied warranties of merchantability and fitness for use (hereinafter "the Warranty Action") (J.A. 1,8-12), for which the applicable Pennsylvania statute of limitations was four years. *See* 13 Pa. C.S.A. §2725 (Purdon 1984) and 42 Pa. C.S.A. §5525 (Purdon 1981). The other lawsuit was filed in the United States District Court for the Southern

[1] The names of all parties to the proceedings in the Court of Appeals are contained in the caption of the case in this Court.

District of Mississippi alleging negligence and strict liability in tort (hereinafter "the Tort Action") (J.A. 3,13-19), for which the applicable Mississippi statute of limitations was six years. *See* Miss. Code Ann. §15-1-49 (1972). Federal court subject matter jurisdiction for both lawsuits was based upon diversity of citizenship pursuant to 28 U.S.C. §1332 (J.A. 8-9,14).

With respect to the Tort Action, the Respondent did not object to either venue or the exercise of in personam jurisdiction over it by a Mississippi court. Instead, the Respondent filed an answer denying liability and raising various affirmative defenses, including applicable statutes of limitations (J.A. 20-25).

Thereafter, on October 2, 1985, the Petitioners moved to transfer the Tort Action to the Western District of Pennsylvania pursuant to 28 U.S.C. §1404(a) (J.A. 3,26-30). The Respondent did not oppose the transfer; and on November 8, 1985, the motion was granted (J.A. 3,34-35).

In the Western District of Pennsylvania the Tort Action and the Warranty Action were consolidated for all purposes (J.A. 1,4,39). On February 20, 1986, the Respondent filed motions for summary judgment as to all claims in both lawsuits, asserting that the claims raised in the Tort Action were barred by Pennsylvania's two-year statute of limitations applicable to negligence and strict liability causes of action (J.A. 1,4,40-42). *See* 42 Pa. C.S.A. §5524(2) (Purdon 1981). The District Court agreed and granted summary judgment as to the Tort Action claims only (J.A. 1,4,43-44). *Ferens v. Deere & Co.*, 639 F. Supp. 1484 (W.D. Pa. 1986), *aff'd*, 819 F.2d 423 (3rd Cir. 1987),

vacated and remanded, ___ U.S. ___, 108 S.Ct. 2862 (1988), *aff'd on remand*, 862 F.2d 31 (3rd Cir. 1988). Final judgment was entered with respect to these claims as the result of the Petitioners' subsequent motion pursuant to Rule 54(b) of the Federal Rules of Civil Procedure (J.A. 1-2,4-5,45-48, 49-50).[3]

The Petitioners appealed to the United States Court of Appeals for the Third Circuit (J.A. 6). The Third Circuit initially affirmed the District Court in a 2-1 panel decision which concluded that the United States Constitution required the application of Pennsylvania's statute of limitations no matter where the case was brought (J.A. 6). *Ferens v. Deere & Co.*, 819 F.2d 423 (3rd Cir. 1987), vacated and remanded, ___ U.S. ___, 108 S.Ct. 2862 (1988). However, this Court granted certiorari and vacated and remanded in light of its Opinion in *Sun Oil Co. v. Wortman*, ___ U.S. ___, 108 S.Ct. 2117 (1988) (J.A. 6). *Ferens v. Deere & Co.*, ___ U.S. ___, 108 S.Ct. 2862 (1988). On remand, the Third Circuit again affirmed the District Court in a 2-1 panel decision (J.A. 7). *Ferens v. Deere & Co.*, 862 F.2d 31 (3rd Cir. 1988). In its Opinion on remand the Court concluded that Pennsylvania's two-year statute of limitations was properly applied to bar the Petitioners' Tort Action because the Petitioners had transferred the case to Pennsylvania. The Petitioners thereafter filed a timely motion for rehearing and for rehearing en banc which was denied on January 5, 1989 (J.A. 7).

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[3] The breach of warranty claims in the Warranty Action were stayed pending the outcome of the Petitioners' appeal (J.A. 49-50).

On March 15, 1989, Petitioners filed their petition for a writ of certiorari with this Court. On May 15, 1989, their petition was granted.

SUMMARY OF ARGUMENT

Following the plaintiff-initiated transfer of the Tort Action pursuant to 28 U.S.C. §1404(a), the District Court in Pennsylvania was obligated to apply the state law that would have been applied if there had been no transfer and the case had been tried in the Southern District of Mississippi where Mississippi's six-year statute of limitations would have resulted in the denial of any motion for summary judgment based upon the statute of limitations. The District Court and the Third Circuit erred by applying Pennsylvania's two-year statute of limitations.

In *Van Dusen v. Barrack*, 376 U.S. 612 (1964), this Court concluded that Section 1404(a) should be regarded as a federal judicial housekeeping measure which simply authorizes a change of courtrooms and not a change in the applicable state law. Although *Van Dusen* did not involve a plaintiff-initiated transfer, the transferor state's law should be applied following plaintiff-initiated transfers as well. The purpose of Section 1404(a) is to allow federal civil suits to be transferred, in the interest of justice, to the most convenient forum. This remedial purpose is available to plaintiffs as well as defendants; and nothing in Section 1404(a) or its legislative history justifies its use to defeat the state-law advantages accruing from a plaintiff's exercise of his right to choose a proper forum.

Applying these principles, a majority of courts have correctly concluded that where the transferor court was a proper forum, the law of the transferor state should continue to apply after a Section 1404(a) transfer regardless of whether the plaintiff or the defendant is the moving

party. In reaching a contrary result, the Third Circuit majority erroneously relied upon decisions involving transfers from courts where jurisdiction or venue was improper. In the present case venue and jurisdiction were proper in the Southern District of Mississippi; and, accordingly, the District Court should have applied Mississippi law.

The Third Circuit majority apparently based its contrary decision upon its perception that the Petitioners were guilty of impermissible forum shopping. This perception is incorrect. Petitioners had a right to select the forum with the most favorable law, so long as it was a proper forum. Their motion to transfer was not improper forum shopping because Petitioners had already properly obtained the advantages of the more favorable Mississippi law. Their motion simply sought to make the trial of the case more convenient for all the parties and witnesses and a more efficient utilization of judicial resources, the very purposes for which Section 1404(a) was enacted.

Because the Petitioners properly selected the Southern District of Mississippi as their forum, the subsequent transfer of their lawsuit pursuant to Section 1404(a) cannot be used by Respondent to defeat the advantages accruing to the Petitioners from the proper exercise of their venue privilege. Accordingly, the Third Circuit's judgment should be reversed.

ARGUMENT

I. The Transferee District Court Was Obligated To Apply The Law Of The Transferor State Following The Transfer Of The Case Upon The Unopposed Motion Of The Petitioners

The Petitioners, who were the plaintiffs in the District Court, successfully moved to have the Tort Action transferred from the Southern District of Mississippi to the Western District of Pennsylvania pursuant to 28 U.S.C. §1404(a). Section 1404(a) provides:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

The critical issue in this case is whether the District Court in Pennsylvania, following the plaintiff-initiated transfer pursuant to Section 1404(a), was obligated to apply the state law that would have been applied if there had been no transfer and the case had been tried in the Southern District of Mississippi.

It is undisputed that had the Tort Action been tried in the Southern District of Mississippi, the federal court there would have applied Mississippi's six-year statute of limitations, Miss. Code Ann. §15-1-49 (1972)[3]; and any

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[3] At present Miss. Code Ann. §15-1-49 (1972) provides:

> All actions for which no period of limitations is prescribed shall be commenced within six years next after the cause of such action accrued, and not after.

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motion for summary judgment by the Respondent based upon a statute of limitations argument would have been denied. *See Ferens v. Deere & Co.*, 862 F.2d 31, 34 (3rd Cir. 1988). Under the *Erie* doctrine the District Court in Mississippi, sitting in a diversity action, would have applied the law of the state in which the Court was located. *See Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). *See also Guaranty Trust Co. v. York*, 326 U.S. 99, 110 (1945) (state statutes of limitations are applicable in federal diversity cases). This application of state law would have included Mississippi's conflicts of laws rules. *See Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496 (1941); *King v. Otasco, Inc.*, 861 F.2d 438, 441 (5th Cir. 1988).

In choice of law situations Mississippi applies its own statute of limitations to actions brought in Mississippi even though they are otherwise governed by the substantive law of another state. *See Williams v. Taylor Machinery, Inc.*, 529 So.2d 606, 609 (Miss. 1988); *Shrubrooks v. A.C. and S., Inc.*, 529 So.2d 557, 566 (Miss. 1988); *Vick v. Cochran*, 316 So.2d 242, 246 (Miss. 1975); *Louisiana & Mississippi R. Transfer Co. v. Long*, 159 Miss. 654, 665-666, 131 So. 84, 88 (1930). *See also King v. Otasco, Inc.*, 861 F.2d at 441.[4] Thus, the District Court in Mississippi would

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The Mississippi legislature has now enacted legislation which will, effective July 1, 1989, amend Miss. Code Ann. §15-1-49 by reducing the limitations period to three years with respect to causes of action accruing on or after July 1, 1989. *See* H.B. 1171, Reg. Sess., 1989 Miss. Laws, §§3,7,8.

[4] In *Sun Oil Co. v. Wortman*, ___ U.S. ___, 108 S.Ct. 2117, 2121 (1988), this Court recently upheld the constitutionality of such a practice.

have applied Mississippi's six-year statute of limitations in the present case.[5]

After the transfer, however, the District Court in Pennsylvania elected to apply the law of the transferee state, in particular, Pennsylvania's two-year statute of limitations applicable to negligence and strict liability causes of action. *See* 42 Pa. C.S.A. §5524(2) (Purdon 1981).[6] Because the Tort Action was barred by the Penn-

[5] Although Mississippi has a "borrowing statute" relating to causes of action which have accrued in some other state and cannot be maintained there because of the lapse of time, *see* Miss. Code Ann. §15-1-65 (1972), the courts in Mississippi have consistently held that this statute applies only to a non-resident who moves to Mississippi after the statute has run on the cause of action in the other state. *See Williams v. Taylor Machinery, Inc.*, 529 So.2d at 609; *Shrubbrooks v. A.C. and S., Inc.*, 529 So.2d at 565-566; *Louisiana & Mississippi R. Transfer Co. v. Long*, 159 Miss. at 667, 131 So. at 88. *See also Cowan v. Ford Motor Co.*, 719 F.2d 785, 786 (5th Cir. 1983); *Kershaw v. Sterling Drug, Inc.*, 415 F.2d 1009, 1011 (5th Cir. 1969). The Mississippi legislature has also amended Miss. Code Ann. §15-1-65, effective July 1, 1989, with respect to causes of action accruing on or after July 1, 1989. *See* H.B. 1171, Reg. Sess., 1989 Miss. Laws, §§4,7,8.

[6] The Pennsylvania statute, 42 Pa. C.S.A. §5524(2) (Purdon 1981), provides:

> The following actions and proceedings must be commenced within two years:
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> • • • •
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> (2) An action to recover damages for injuries to the person or for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another.

sylvania statute of limitations, the District Court granted Respondent's motion for summary judgment. *Ferens v. Deere & Co.*, 639 F. Supp. 1484, 1492 (W.D. Pa. 1986), *aff'd*, 819 F.2d 423 (3rd Cir. 1987), *vacated and remanded*, ___ U.S. ___, 108 S.Ct. 2862 (1988), *aff'd on remand*, 862 F.2d 31 (3rd Cir. 1988). Accordingly, the Pennsylvania District Court's decision to apply the law of the transferee state, rather than the law of the transferor state, was fatal to the Petitioners' Tort Action. The District Court's decision, however, is inconsistent with this Court's reasoning in *Van Dusen v. Barrack*, 376 U.S. 612 (1964), and contrary to the vast weight of authority.

In *Van Dusen* the defendants sought to transfer to the District of Massachusetts forty wrongful death actions brought in the Eastern District of Pennsylvania by the personal representatives of certain victims of an airline accident which had occurred in Massachusetts. In interpreting the "interest of justice" portion of 28 U.S.C. §1404(a), this Court was required to determine which state law would apply if a transfer were to occur. After a careful analysis, this Court stated:

> We believe, therefore, that both the history and purposes of §1404(a) indicate that it should be regarded as a federal judicial housekeeping measure, dealing with the placement of litigation in the federal courts and generally intended, on the basis of convenience and fairness, simply to authorize a change of courtrooms. [footnote omitted]

Van Dusen v. Barrack, 376 U.S. at 636-637. Because Section 1404(a) deals only with the placement of litigation, and

not the law to be applied, the Court concluded that in cases such as the one before it,

> . . . the transferee district court must be obligated to apply the state law that would have been applied if there had been no change of venue. A change of venue under §1404(a) generally should be, with respect to state law, but a change of courtrooms. [footnote omitted]

Id., 376 U.S. at 639. *See also Cowan* v. *Ford Motor Co.*, 713 F.2d 100, 104 n.6 (5th Cir. 1983) (if case is transferred on defendant's motion, Mississippi statute of limitations would still apply); *Schreiber* v. *Allis-Chalmers Corp.*, 611 F.2d 790, 792-793 (10th Cir. 1979) (Mississippi statute of limitations would be applied in case transferred to Kansas). *Cf. Stewart Organization, Inc.* v. *Ricoh Corp.*, ___ U.S. ___, 108 S.Ct. 2239, 2245 (1988) (a transfer pursuant to §1404(a) does not carry with it a change in the applicable law).

In refusing to apply the state law of the transferor state, as was required in *Van Dusen*, the Third Circuit emphasized that *Van Dusen* involved a transfer sought by the defendants and noted that this Court limited its holding in *Van Dusen* to defendant-initiated transfers. *See Ferens* v. *Deere & Co.*, 862 F.2d at 34-35. While it is true that this Court reserved judgment on whether the same considerations would govern a plaintiff-initiated transfer, *see Van Dusen* v. *Barrack*, 376 U.S. at 640, the Court's reasoning and analysis are equally compelling in requiring the application of the transferor state's law regardless of which party is seeking the transfer.

The purpose of Section 1404(a) is to allow federal civil suits to be transferred, in the interest of justice, to the most convenient forum.

> Section 1404(a) reflects an increased desire to have federal civil suits tried in the federal system at the place called for in the particular case by considerations of convenience and justice. [footnote omitted]

Van Dusen v. *Barrack*, 376 U.S. at 616.

> The idea behind §1404(a) is that where a "civil action" to vindicate a wrong - however brought in a court - presents issues and requires witnesses that make one District Court more convenient than another, the trial judge can, after findings, transfer the whole action to the more convenient court.

Continental Grain Co. v. *Barge FBL-585*, 364 U.S. 19, 26 (1960), quoted with approval in *Van Dusen* v. *Barrack*, 376 U.S. at 622.

This remedial purpose is available to a plaintiff as well as a defendant. *See Coffey* v. *Van Dorn Iron Works*, 796 F.2d 217, 219 (7th Cir. 1986); *Philip Carey Mfg. Co.* v. *Taylor*, 286 F.2d 782, 784 (6th Cir.), *cert. denied*, 366 U.S. 948 (1961); 1A(Pt.2) J. Moore, W. Taggart, A. Vestal, J. Wicker & B. Ringle, *Moore's Federal Practice*, ¶ 0.345[4.-2] (2d ed. 1989). Nothing in Section 1404(a) provides for a change of the applicable law when the case is transferred by a plaintiff rather than a defendant. The Section simply provides for a change of venue "[f]or the convenience of parties and witnesses, in the interest of justice." 28 U.S.C. §1404(a).

> There is nothing . . . in the language or policy of §1404(a) to justify its use by defendants to defeat the advantages accruing to plaintiffs who have chosen a

forum which, although it was inconvenient, was a proper venue.

Van Dusen v. Barrack, 376 U.S. at 633-634.

> [The] legislative background [of §1404(a)] supports the view that §1404(a) was not designed to narrow the plaintiff's venue privilege or to defeat the state-law advantages that might accrue from the exercise of this venue privilege but rather the provision was simply to counteract the inconveniences that flowed from the venue statutes by permitting transfer to a convenient federal court. The legislative history of §1404(a) certainly does not justify the rather startling conclusion that one might "get a change of law as a bonus for a change of venue." [footnote omitted]

Id., 376 U.S. at 635-636.

Although this Court reserved judgment in *Van Dusen* on the application of these principles to plaintiff-initiated transfers under Section 1404(a), several of the circuit courts have addressed the issue. Except for the Third Circuit, these courts have correctly concluded that where the transferor district court was a proper forum, the law of the transferor state should continue to apply after the transfer. *See Martin v. Stokes*, 623 F.2d 469, 471 (6th Cir. 1980); *In re Bendectin Litigation*, 857 F.2d 290, 306 (6th Cir. 1988), *cert. denied sub nom. Hoffman v. Merrell Dow Pharmaceuticals, Inc.*, ___ U.S. ___, 109 S.Ct. 788 (1989) (following *Martin v. Stokes* with respect to plaintiff-initiated transfers); *Roofing & Sheet Metal Services, Inc. v. LaQuinta Motor Inns, Inc.*, 689 F.2d 982, 991 n.14 (11th Cir. 1982). *Cf. Gonzalez v. Volvo of America Corp.*, 734 F.2d 1221, 1224 (7th Cir. 1984), *superseded*, 752 F.2d 295 (7th Cir. 1985).[9]

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[9] *The Gonzalez case involved a plaintiff-initiated transfer pursuant to 28 U.S.C. §1404(a). In its original opinion the*

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Martin v. Stokes, supra, contains a comprehensive review of the applicable law following transfers under both 28 U.S.C. §1404(a) and its companion section, 28 U.S.C. §1406(a), governing transfers where venue is improper. The Court concluded that the applicable law following a transfer does not depend on whether the transfer is made on the motion of the plaintiff or defendant, but does depend upon whether the transfer is pursuant to Section 1404(a) or Section 1406(a). *Id.*, 623 F.2d at 471. In reaching this conclusion, the Court noted that Section 1404(a) applies to actions brought in proper but inconvenient courts. *Id.*, 623 F.2d at 471. The Court reasoned that since a transfer under Section 1404(a) represents only a change in courtrooms for the convenience of the litigants and witnesses, it should not affect the state law governing the action. *Id.*, 623 F.2d at 472.

The Court also noted the goal of identity or uniformity between federal and state courts sought by *Erie R. Co. v. Tompkins*, *supra*, and its progeny, and the conclusion reached in *Van Dusen* that in applying these principles to Section 1404(a), the critical identity to be maintained was

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Court, citing Martin v. Stokes, supra, and Roofing & Sheet Metal Services, Inc. v. LaQuinta Motor Inns, Inc., supra, held that when a plaintiff has exercised his choice of forum in the first instance by selecting a permissible forum, the state law of that forum should govern the action regardless of which party initiates a transfer. 734 F.2d at 1224. However, the Court subsequently issued a second opinion superseding its original opinion and deciding the case on other grounds. 752 F.2d 295. Consequently, the question of the effect on the applicable law of a plaintiff-initiated transfer under Section 1404(a) is unresolved in the Seventh Circuit. Coffey v. Van Dorn Iron Works, 796 F.2d at 221 n.6.

between the federal district court which decides the case and the courts of the state in which the action was filed. *Martin v. Stokes*, 623 F.2d at 472-473. The Court then correctly reasoned as follows:

> By determining the choice of law solely on the basis of the nature of the transfer, a result is reached that is consistent both with *Van Dusen* and the *Erie* doctrine. Once a plaintiff has exercised his choice of forum by selecting a permissible forum, the state law of that forum should govern the action, regardless of the wisdom of the plaintiff's selection. Thus, no matter who seeks to transfer the action to a more convenient forum under §1404(a), the state law of the forum in which the action was originally commenced remains controlling. In this manner, the outcome in the transferee district court will be the same as the outcome would have been in the state courts of the state where the action was originally brought.
>
> Accordingly, we conclude that the choice of law is dependent on the nature of the transfer. If an action is transferred under §1404(a), the state law of the transferor court should be applied.

Id., 623 F.2d at 470. *See also In re Air Crash Disaster at Washington, D.C. on January 13, 1982*, 559 F. Supp. 333, 340 n.5 (D. D.C. 1983); *In re Richardson-Merrell, Inc.*, 545 F. Supp. 1130, 1135 (S.D. Ohio 1982); *Alexander v. Richardson-Merrell, Inc.*, 541 F. Supp. 93, 99 (S.D. N.Y. 1982); 1A(Pt.2) J. Moore, W. Taggart, A. Vestal, J. Wicker & B. Ringle, *Moore's Federal Practice*, ¶ 0.345[4.-5] (2d ed. 1989); Note, *Choice of Law in Federal Courts after Transfer of Venue*, 63 Cornell L. Rev. 149, 154-159 (1977). *Cf.* 15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*, §3846 (2d ed. 1986) (recognizing that courts are increasingly applying the law of the transferor court if that court was proper in terms of venue and personal jurisdiction).

The Ninth Circuit, without reference to whether the transfer was initiated by the plaintiff or the defendant, has simply concluded that where a case is transferred for the convenience of the parties pursuant to Section 1404(a), the transferee court must apply the law of the transferor court. *See Nelson v. International Paint Co.*, 716 F.2d 640, 643 (9th Cir. 1983). *See also Ross v. Colorado Outward Bound School, Inc.*, 822 F.2d 1524, 1527 (10th Cir. 1987); *Manley v. Engram*, 755 F.2d 1463, 1467 n.10 (11th Cir. 1985); *Truck Insurance Exchange v. Tetzlaff*, 683 F. Supp. 223, 225 (D. Nev. 1988); *RPJ Sportswear, Inc. v. Xylo Tex, Ltd.*, 681 F. Supp. 225, 227 (S.D. N.Y. 1988); *Western Smelting & Metals, Inc. v. Slater Steel, Inc.*, 621 F. Supp 578, 581 (N.D. Ind. 1985); *Davis v. Costa-Gavras*, 580 F. Supp. 1082, 1086 (S.D. N.Y. 1984); *Subacz v. Town Tower Motel Corp.*, 567 F. Supp. 1308, 1316 (N.D. Ind. 1983). *Cf. Bott v. American Hydrocarbon Corp.*, 441 F.2d 896, 899 (5th Cir. 1971) (where the transfer originates in a suggestion by the court and with the concurrence of the defendant and no objection by the plaintiff, the law of the transferor court is applied); *Schuman v. Mezzetti*, 702 F. Supp. 52, 53-54 (E.D. N.Y. 1988) (where the parties stipulate to a transfer pursuant to Section 1404(a), the law of the transferor court is applied).

Those cases cited by the Third Circuit majority in *Ferens* as supporting the application of the law of the transferee court after a plaintiff-initiated transfer under Section 1404(a) involved situations where jurisdiction or venue in the transferor state appeared to be improper. *See*

Carson v. *U-Haul Co.*, 434 F.2d 916, 918 (6th Cir. 1970)[8]; *Parham* v. *Edwards*, 346 F. Supp. 968, 971-972 (S.D. Ga. 1972), *aff'd per curiam*, 470 F.2d 1000 (5th Cir. 1973). Section 1404(a) applies to actions which have been brought in a permissible forum. *See Martin* v. *Stokes*, 623 F.2d at 471. It is therefore appropriate that the law of an improper transferor court not be applied after a transfer. Otherwise, a plaintiff could gain the advantage of the law of a state where he could not have maintained his lawsuit by filing the lawsuit there and then transferring it to a state where venue and jurisdiction were proper, but the law was less favorable. *See Roofing & Sheet Metal Services, Inc.* v. *LaQuinta Motor Inns, Inc.*, 689 F.2d at 991-992; *Ellis* v. *Great Southwestern Corp.*, 646 F.2d 1099, 1110 (5th Cir. 1981); *Reyno* v. *Piper Aircraft Co.*, 630 F.2d 149, 165 (3rd Cir. 1980), *rev'd on other grounds*, 454 U.S. 235 (1981).[9]

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[8] The *Carson* case was distinguished by the Sixth Circuit in its subsequent opinion in *Martin* v. *Stokes*, 623 F.2d at 472 n.4, on the basis that the transferee court lacked jurisdiction. The Court, however, also overruled any inference in *Carson* that the applicable law depended upon whether the plaintiff or the defendant was seeking the transfer: "While some authorities . . . have emphasized the importance of the party seeking the transfer, [citations omitted], we believe that the more appropriate emphasis is on the nature of the transfer." *Id.*, 623 F.2d at 472.

[9] The District Court in *Ferens* also relied upon the American Law Institute's *Study Of The Division Of Jurisdiction Between State And Federal Courts* (1969) which proposed legislation including a requirement that the transferee court apply the transferee court's law following all plaintiff-initiated transfers. The proposal did not distinguish between cases in which the original court was a proper or improper forum. Congress has thus far been as unwilling to impose such a requirement on

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In the present case, however, venue and jurisdiction were *proper* in the Southern District of Mississippi.[10] The

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(Continued from previous page)

plaintiff-initiated transfers as have the majority of courts considering the issue. The revisions proposed by this study were introduced in Congress in 1971, S. 1876, 92d Cong., 1st Sess., 117 Cong. Rec. 15071 (1971), and reintroduced in 1973, S. 1876, 93d Cong., 1st Sess., 119 Cong. Rec. 16658 (1973), but have never been enacted.

[10] The Respondent never challenged either venue or the exercise of in personam jurisdiction over it by the District Court in Mississippi; and, indeed, any such challenge would clearly have been unsuccessful. At the time the suit was filed, venue over a corporation was appropriate in any judicial district in which the corporation was licensed to do business or was doing business. *See* 28 U.S.C. §1391(c) (amended effective February 17, 1989). In its answer in the Tort Action, the Respondent admitted that it was doing business in Mississippi, was registered with the Secretary of State of Mississippi, and maintained a local registered agent in Jackson, Mississippi (J.A. 21). Mississippi law at the time provided that a foreign corporation doing business in Mississippi was subject to suit in Mississippi to the same extent that Mississippi corporations were, regardless of whether the cause of action accrued in Mississippi or not. *See* Miss. Code Ann., §79-1-27 (1972) (repealed effective January 1, 1988). *See also* Miss. Code Ann., §79-3-229 (1972) (repealed effective January 1, 1988). In *S. & W. Construction Co.* v. *Douglas*, 244 Miss. 498, 506, 142 So.2d 33, 34 (1962), the Mississippi Supreme Court held that under Mississippi law, a Mississippi state court had jurisdiction to hear a case involving a nonresident plaintiff injured in another state suing a foreign corporation which, however, had qualified to do business in Mississippi and had appointed a resident agent for service of process. *See also Shrubrooks* v. *A.C. and S., Inc.*, 529 So.2d at 559; *Poole* v. *Mississippi Publishers Corp.*, 208 Miss. 364, 380, 44 So.2d 667, 673 (1950); *Cowan* v. *Ford Motor Co.*, 694 F.2d 104, 105-106 (5th Cir. 1982); *Schreiber* v. *Allis-Chalmers Corp.*, 611 F.2d at 793.

better-reasoned rule and the overwhelming weight of authority recognize that where the original forum is a proper one, a convenience transfer by the plaintiff under Section 1404(a) should carry with it no change in the applicable law.[11] Accordingly, the District Court should have applied the Mississippi statute of limitations and denied Respondent's motion for summary judgment.

II. The Petitioners' Utilization Of The Transfer Statute To Transfer The Case Did Not Constitute Impermissible Forum Shopping

In holding that the District Court correctly applied the Pennsylvania statute of limitations, the majority in the Third Circuit apparently based its decision on its perception that the Petitioners' actions constituted impermissible forum shopping. As this Court recognized in *Van Dusen*, however, federal law gives a plaintiff the right to select the forum with the most favorable law so long as it is a proper forum in which the case may be brought. *See Van Dusen v. Barrack*, 376 U.S. at 632-635. *See also Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 250 (1981); *Ferens v. Deere & Co.*, 862 F.2d at 35; *Headrick v. Atchison, T. & S. F. Ry. Co.*, 182 F.2d 305, 309 (10th Cir. 1950). Indeed, this Court not only recognized a plaintiff's venue privilege, but deemed it deserving of protection from defendants seeking to use Section 1404(a) to defeat the state-law

[11] The application of such a rule will also benefit the efficient administration of the federal court system because plaintiffs will not be deterred from initiating transfers for purposes of consolidation with other pending cases arising out of the same or a related set of facts.

advantages accruing therefrom. *See Van Dusen v. Barrack*, 376 U.S. at 633-635.

In the present case, the Southern District of Mississippi was a proper forum. Both jurisdiction and venue were undeniably proper; and the Petitioners were, therefore, clearly entitled to select Mississippi as their forum and gain the advantages of that state's favorable laws.[12] The Petitioners' proper exercise of their right to select a favorable forum cannot constitute improper forum shopping.

Nor was their motion to transfer improper forum shopping.[13] Forum shopping necessarily implicates some attempt to select a forum with a more favorable procedural or substantive law. *See Ferens v. Deere & Co.*, 862

[12] Indeed, as Judge Seitz recognized in his dissent, the Petitioners had no choice but to file suit in Mississippi because of the pertinent statutes of limitations. *See Ferens v. Deere & Co.*, 862 F.2d at 37 (Seitz, J., Dissenting).

[13] After the Petitioners filed their motion to change venue, Respondent did not file any affidavit or response opposing the motion as constituting improper forum shopping or arguing that it would be improper to apply Mississippi's statute of limitations if the case were transferred to Pennsylvania. Of course, had Respondent done so and convinced the Court in Mississippi to deny the motion, the Petitioners would still have had a forum, albeit an inconvenient one, in which to try their case. By not opposing the transfer and then seeking to have the case dismissed in Pennsylvania because of Pennsylvania's statute of limitations, Respondent has essentially used a Section 1404(a) transfer to defeat the state-law advantages which had accrued to the Petitioners from the proper exercise of their venue privilege. *Van Dusen* teaches that such a use of Section 1404(a) is improper. *See Van Dusen v. Barrack*, 376 U.S. at 633-636.

F.2d at 37 (Seitz, J., Dissenting). *Cf. Van Dusen* v. *Barrack*, 376 U.S. at 636 (if a change of law were in the offing, parties might use Section 1404(a) as a forum-shopping device). The Petitioners, however, had already obtained the advantage of the most favorable law by properly selecting Mississippi as their forum. The Petitioners could have proceeded to trial on the merits in Mississippi without being barred by the statute of limitations. Their transfer of the case to Pennsylvania provided them with no better law, either procedurally or substantively. Rather, it simply made the trial of the case more convenient for all the parties and witnesses and a more efficient utilization of judicial resources. Providing for the trial of the case in a more convenient forum is the very purpose for which 28 U.S.C. §1404(a) was enacted. Its use by the Petitioners for that very purpose, when the resulting transfer did not provide them with a more advantageous law, cannot under any circumstances be construed as inappropriate forum shopping.

It is instead the rule announced by the majority in *Ferens* which will result in a plaintiff's being able to use 28 U.S.C. §1404(a) as a forum shopping device to obtain the application of more favorable law. As the majority acknowledges, its construction of Section 1404(a) will allow a less diligent plaintiff who has filed his lawsuit in a forum with less favorable law to utilize Section 1404(a) to obtain the advantages of the more favorable law of another forum by initiating a transfer. *See Ferens* v. *Deere & Co.*, 862 F.2d at 36. *See also Martin* v. *Stokes*, 623 F.2d at 472.

In the present case the Petitioners *properly* selected the Southern District of Mississippi as their forum for the

Tort Action, thereby obtaining the state-law advantage of Mississippi's six-year statute of limitations. The subsequent transfer of the Tort Action to the Western District of Pennsylvania pursuant to the Petitioners' unopposed motion to transfer[14] cannot be used by the Respondent to defeat the advantages accruing to the Petitioners from their proper exercise of the privilege of selecting a forum. No change of law can result from the change of venue. To hold otherwise, as the Third Circuit did, is to ignore this

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[14] There is no question but that the Tort Action met the statutory requirements for a transfer pursuant to 28 U.S.C. §1404(a) because the transfer was clearly for the convenience of the parties and witnesses and in the interest of justice. As the affidavit accompanying the Petitioners' motion for a change of venue demonstrated, all witnesses with any knowledge of the accident or injuries resided in the Western District of Pennsylvania and all documents relating to the injuries were also located there (J.A. 32). The Respondent filed no counter affidavit or other opposition claiming any inconvenience or prejudice from a transfer to Pennsylvania. In fact, the transfer also convenienced the Respondent because both parties would be able to reduce their legal expenses by consolidating the Tort Action and the Warranty Action which were based on essentially one set of facts (J.A. 28). The "interest of justice" component of a Section 1404(a) transfer analysis relates to the efficient administration of the court system. *Coffey* v. *Van Dorn Iron Works*, 796 F.2d at 221. In the present case the ability to consolidate the two lawsuits and to have the case tried by a federal judge familiar with the applicable substantive law of Pennsylvania also favored transferring the case to Pennsylvania. *Cf. Van Dusen* v. *Barrack*, 376 U.S. at 643-646; *Coffey* v. *Van Dorn Iron Works*, 796 F.2d at 221. Thus, a transfer was unquestionably appropriate under 28 U.S.C. §1404(a). Of course, since the Respondent did not oppose the Petitioners' motion for a change of venue or seek review of the transfer order, the propriety of the transfer order is not in issue.

Court's admonition that the federal courts should "ensure that the 'accident' of federal diversity jurisdiction does not enable a party to utilize a transfer to achieve a result in federal court which could not have been achieved in the courts of the State where the action was filed." *Van Dusen v. Barrack*, 376 U.S. at 638.

The Petitioners' Tort Action would not have been barred by the statute of limitations in the courts of Mississippi where the lawsuit was filed. The Respondent cannot be permitted to utilize the transfer to Pennsylvania, which was accomplished for the convenience of the parties and witnesses and in the interest of justice, to achieve a different result.

CONCLUSION

For the foregoing reasons the judgment of the United States Court of Appeals for the Third Circuit should be reversed.

Respectfully submitted,

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Date: June 29, 1989

No. 88-1512

FILED
JUN 29
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

ALBERT J. FERENS and
MARGARET L. FERENS, his wife,

Petitioners,

vs.

JOHN DEERE COMPANY, a/k/a
DEERE & COMPANY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

JOINT APPENDIX

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Petition For Certiorari Filed March 15, 1989
Certiorari Granted May 15, 1989

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* Except for the Complaint filed in Civil Action No. 85-1534, all of the District Court pleadings, orders and opinions contained in this Joint Appendix were filed with respect to Civil Action No. 85-2725 (No. J85-733 (B) in the Southern District of Mississippi) or with respect to both Civil Action No. 85-2725 and Civil Action No. 85-1534.

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RELEVANT DOCKET ENTRIES AT CIVIL ACTION NO. 85-1534 IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Date	
1985	
July 3	Complaint filed.
Aug. 5	Answer filed by defendant.
Aug. 29	Reply to answer and/or affirmative defenses filed by plaintiffs.
Nov. 21	Plaintiffs' motion for consolidation of actions filed with a proposed order.
Nov. 21	Order entered directing that the action of Albert Ferens, et ux. v. John Deere Co. a/k/a Deere & Co. at C.A. 85-2725 be and hereby is consolidated with C.A. 85-1534 for all purposes. (Cohill, J.)
1986	
Feb. 20	Deere & Company's motion for summary judgment filed with a proposed order.
July 25	Opinion filed and order entered directing that defendant's motion for summary judgment be and hereby is denied with respect to the claims brought by C.A. 85-1534; defendant's motion for summary judgment be and hereby is granted with respect to the claims brought by C.A. 85-2725. (Cohill, J.)
Aug. 20	Motion for certification and final judgment upon less than all claims pursuant to Rule

54(b) and request for stay of further proceedings and extension of time to appeal filed by plaintiffs with a proposed order.

Sept. 5 Order entered directing that as to the summary judgment at C.A. 85-2725 there is no just reason for delay and therefore entry of final judgment is directed; an extension of 30 days is hereby granted to plaintiffs to file an appeal on the within final judgment; a stay of further proceedings is granted upon C.A. 85-1534 until such time as the issue on appeal is resolved. (Cohill, J.)

RELEVANT DOCKET ENTRIES AT CIVIL ACTION NO. 85-2725 IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA (TRANSFERRED FROM THE SOUTHERN DISTRICT OF MISSISSIPPI)

Date

1985

Nov. 15 The following papers were received from the Southern District of Mississippi and filed:

Complaint filed with request for jury trial. (filed 7/25/85)

Answer of defendant filed with jury trial request. (filed 9/27/85)

Plaintiff's motion for change of venue filed. (filed 10/2/85)

Affidavit of Albert J. Ferens filed. (filed 10/2/85)

Hearing on 10/24/85 before Magistrate Countiss on plaintiff's motion for change of venue; action taken: granted – cause will be transferred. (filed 10/25/85)

Order changing venue. Plaintiff's motion for change of venue is granted and it is ordered that this cause is transferred to the U.S. District Court, Western District of Pennsylvania for the convenience of the parties and witnesses; further ordered that the Clerk effectuate the transfer according to law.

Nov. 21 Plaintiffs' motion for consolidation of actions filed with a proposed order.

Nov. 21 Order entered directing that the action of Albert Ferens, et ux. v. John Deere Co. a/k/a Deere & Co. at C.A. 85-2725 be and hereby is consolidated with Albert Ferens, et ux. v. Deere & Co. at C.A. 85-1534 for all purposes. (Cohill, J.)

1986

Feb. 20 Deere & Company's motion for summary judgment filed with a proposed order.

July 25 Opinion filed and order entered directing that defendant's motion for summary judgment be and hereby is denied with respect to the claims brought by C.A. 85-1534; defendant's motion for summary judgment be and hereby is granted with respect to the claims brought by C.A. 85-2725. (Cohill, J.)

Aug. 20 Motion for certification and final judgment upon less than all claims pursuant to Rule 54(b) and request for stay of further proceedings and extension of time to appeal filed by plaintiffs with a proposed order.

Sept. 5 Order entered directing that as to the summary judgment at C.A. 85-2725 there is no just reason for delay and therefore entry of final judgment is directed; an extension of 30 days is hereby granted to plaintiffs to file an appeal on the within final judgment; a stay of further proceedings is granted upon C.A.

85-1534 until such time as the issue on appeal is resolved. (Cohill, J.)

Oct. 2 Notice of appeal filed from order dated 9/5/86.

RELEVANT DOCKET ENTRIES AT No. 86-3595
IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Date	
1986	
Oct. 7	Appeal docketed.
1987	
May 28	Opinion filed and judgment entered affirming the judgment of the District Court.
June 22	Petition for rehearing and rehearing en banc filed.
July 9	Order denying the petition for rehearing filed.
1988	
June 29	Copy of the Supreme Court letter dated 6/27/88 stating that petition for certiorari is granted, the judgment is vacated and the case is remanded for further consideration received.
Aug. 8	Copy of the Supreme Court judgment dated 6/27/88 vacating the judgment of the Third Circuit and remanding for further consideration filed.

Nov. 25	Opinion filed and judgment entered on remand from the Supreme Court of the United States affirming the judgment of the District Court.
Dec. 9	Petition for rehearing and rehearing en banc filed.
1989	
Jan. 5	Order denying the petition for rehearing filed.
May 17	Certified copy of order granting certiorari on May 15, 1989 in the Supreme Court filed.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSLVANIA

ALBERT J. FERENS and MARGARET L. FERENS, his wife,	)	Civil Action No. 85-1534
Plaintiffs,	)	JURY TRIAL DEMANDED
vs.	)	
DEERE & COMPANY,	)	
Defendant.	)	

COMPLAINT

AND NOW, comes ALBERT J. FERENS and MARGARET L. FERENS, his wife, Plaintiffs, by and through their counsel, Finkel Lefkowitz Ostrow & Woolridge, and hereby claims damages of DEERE & COMPANY, upon the following causes of action:

1. The plaintiffs are husband and wife and reside in the County of Washington and Commonwealth of Pennsylvania.

2. The defendant, Deere & Company (hereinafter "Deere") is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its principal office at John Deere Road, Moline, Illinois 61265, and regularly doing business in the Commonwealth of Pennsylvania and County of Allegheny.

3. The parties hereto being citizens of different states and the amount in controversy exceeding the sum

of $10,000.00 exclusive of interest and costs, jurisdiction is therefore invoked pursuant to 28 U.S.C. §1332.

4. On or about July 17, 1981 husband-plaintiff purchased a John Deere Sidehill #6620 Combine, Serial No. 454097 (hereinafter "Combine").

5. The aforesaid Combine was manufactured by defendant, Deere, who was in the business of manufacturing, advertising, selling and distributing combines.

6. Defendant Deere sold the combine in question to Uniontown Farm Equipment Company in Uniontown, Pennsylvania, which company hereafter sold the combine to plaintiff for use on his farm.

7. On or about July 5, 1982, while plaintiff was cleaning the Combine, his hand was pulled into the rotating auger, thereby traumatically amputating his right hand above the wrist.

COUNT I

Albert J. Ferens vs. *Deere & Company*

8. Paragraphs 1 through 7 of this Complaint, by reference hereto, are made a part of this Count I as though specifically pleaded.

9. Solely as a result of the aforesaid injuries, the plaintiff has sustained the following damages:

(a) Traumatic amputation of his right hand above the wrist, with consequent disfiguring scars;

(b) He has incurred and will in the future continue to incur expenses for doctor bills, hospital bills, medicines, prosthesis, and other incidentals;

(c) He has undergone and in the future will continue to undergo great mental and physical pain and suffering, inconvenience and embarrassment;

(d) His earning power has been impaired and in the future will be permanently impaired;

(e) He has suffered and in the future will continue to suffer severe loss of earnings and profits;

(f) He has been and in the future will continue to be deprived of the ordinary pleasures of life.

10. The said combine was expressly and/or impliedly warranted by defendant to be merchantable and fit for the ordinary purposes for which it was used as more specifically stated in 13 Pa.C.S. 2312 and 2313.

11. The aforesaid combine was not merchantable and not fit for the ordinary purposes for which it was used by reason of being designed and manufactured defectively.

12. The Defendant Deere breached its expressed and/or implied warranties in the following particular manner:

(a) In manufacturing, advertising, selling and/or distributing the Combine assembled in a defective manner with a defectively designed clean-out door, and unfit for the purpose for which it was intended to be used and for which it was used;

(b) In manufacturing, advertising, selling and/or distributing the Combine which defendant, Deere, expressly and/or impliedly warranted was free of all defects, which in fact was not free of defects.

(c) In manufacturing, advertising, selling and/or distributing the Combine which did not conform with normal commercial standards in the trade in which defendant Deere was engaged;

(e) In that defendant Deere knew or should have known that the aforesaid Combine was inadequate for the purpose intended;

(f) In expressly and/or impliedly warranting and representing to plaintiff that said defective Combine which was sold to plaintiff was fit for purposes for which it was supplied when same was not so fit.

14. As a direct and proximate cause of the defendant's Deere's breach of warranties as above described, Plaintiff has sustained injuries and damages as set forth in Paragraph 9 of this Complaint which are incorporated herein by reference.

WHEREFORE, Plaintiff claims of defendant, Deere & Company, appropriate damages and demands that this case by tried by a jury.

COUNT II

Margaret L. Ferens v. Deere & Company

15. Paragraphs 1 through 14 of this Complaint are hereby incorporated by reference as if set forth verbatim.

16. That, further as a direct and proximate result of the breach of warranties as hereinabove more fully set forth, the wife-plaintiff has in the past lost the love, society, companionship, affection, and consortium of her husband, the Plaintiff, Albert J. Ferens, all of which may continue for an indefinite period of time in the future.

WHEREFORE, plaintiff claims of defendant, Deere & Company, appropriate damages and demand this case be tried by a jury.

FINKEL LEFKOWITZ OSTROW & WOOLRIDGE

/s/ Stanley V. Ostrow

/s/ William A. Penrod
Attorneys for Plaintiffs

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

ALBERT J. FERENS and MARGARET L. FERENS, his wife, Plaintiffs,	)	Civil Action No. J85-733(B)
vs.	)	JURY TRIAL DEMANDED
JOHN DEERE COMPANY, a/k/a DEERE & COMPANY, Defendant.	)	

COMPLAINT

AND NOW, come ALBERT J. FERENS, and MARGARET L. FERENS, his wife, Plaintiffs, by and through their counsel, William W. Barnett, Esquire, and Finkel Lefkowitz Ostrow & Woolridge, and hereby claim damages of JOHN DEERE COMPANY a/k/a DEERE & COMPANY, Defendant, upon the following causes of action:

1. The plainiff is an individual who resides at R.D. #1, Dunbar, Fayette County, and Commonwealth of Pennsylvania.

2. The defendant, John Deere Company a/k/a Deere & Company (hereinafter "Deere") is a corporation organized and existing under and by virtue of the laws of the State of Delaware, is registered with the Secretary of State of Mississippi, is trading and doing business in said State, and maintains a registered office in care of C. T. Corporation System, 118 North Congress Street, Jackson, Mississippi 39201.

3. The parties hereto being citizens of different states and the amount in controversy exceeding the sum of $10,000.00 exclusive of interest and costs, jurisdiction is therefore invoked pursuant to 28 U.S.C. §1332.

4. On or about July 17, 1981, plaintiff purchased a John Deere Sidehill #6620 combine, Serial No. 454907 (hereinafter "Combine").

5. The aforesaid Combine was manufactured by defendant, Deere, who was in the business of manufacturing, advertising, selling and distributing combines.

6. Defendant Deere sold the combine in question to Uniontown Farm Equipment Company, which company thereafter sold the combine to plaintiff for use on his farm.

7. On or about July 5, 1982, while plaintiff was cleaning the Combine, his hand was pulled into the rotating auger, thereby traumatically amputating his hand above the wrist.

8. Solely as a result of the aforesaid injuries, the plaintiff has sustained the following damages:

(a) Traumatic amputation of his hand above the wrist, with consequent disfiguring scars;

(b) He has incurred and will in the future continue to incur expenses for doctor bills, hospital bills, medicines protheses and other incidentals;

(c) He has undergone and in the future will continue to undergo great mental and physical pain and suffering, inconvenience and embarrassment;

(d) His earning power has been impaired and in the future will be permanently impaired;

(e) He has suffered and in the future will continue to suffer severe loss of earnings;

(f) He has been and in the future will continue to be deprived of the ordinary pleasures of life.

COUNT I

Albert J. Ferens v. Deere

9. Paragraphs 1 through 8 of this Complaint are incorporated herein by reference as if set forth verbatim.

10. The aforesaid accident and all the resultant injuries, damages and losses consequent thereto are the proximate result of the carelessness, recklessness and negligence of defendant Deere its agents, servants and employees in the following respects:

(a) In negligently failing to properly design the combine when the defendant knew or should have known the consequence of their failing to do so;

(b) In negligently failing to properly manufacture the combine when the defendant knew or should have known of the consequence of their failing to do so;

(c) In negligently failing to properly inspect the combine prior to its sale and distribution when the defendant knew or should have known of the condition of the combine and then in the absence of such inspection, negligently representing the combine was safe;

(d) In negligently failing to properly warn plaintiff of dangerous condition of combine.

(e) In negligently failing to limit and/or reduce the size of the cleanout door;

(f) In negligently failing to properly manufacture the combine to adequately clean out the sump area;

(g) In negligently failing to specifically and scientifically test the combine, then in the absence of such tests, negligently representing that the combine was safe;

(h) In negligently manufacturing, advertising, selling and distributing said combine without giving any warnings of its defective condition which was known or should have been known to the defendant Deere.

(i) In negligently failing to exercise the standard of care that the laws, customs and codes of the industry and circumstances then required;

(j) In otherwise failing to exercise the due care and caution required under the circumstances;

(k) In failing to exercise reasonable care to discover the defective condition of the combine;

(l) In violating the statutes and regulations of the United States Government, and the laws and regulations of the State of Mississippi.

11. As a direct and proximate cause of defendant Deere's negligence, as described above, plaintiff has sustained injuries and damages as set forth in Paragraphs 7 and 8 of this Complaint which are incorporated herein be reference.

COUNT II –
Albert J. Ferens v. Deere

12. Paragraphs 1 through 11 of this Complaint are incorporated hereby by reference as if set forth verbatim.

13. Defendant Deere know or should have known that that combine would and did reach and would be used by the ultimate user or consumer plaintiff without substantial change in the condition in which it was sold and without inspection for defects.

14. As a result of the above-described defects plaintiff has sustained injuries and damages as set forth in Paragraphs 7 and 8 of this Complaint, which are incorporated herein by reference.

15. The defendant Deere is liable in damages to the plaintiff for violation of the law as incorporated in §402A of the *Restatement of Torts, 2d* in manufacturing and selling a dangerously defective Sidehill Combine.

WHEREFORE, ALBERT J. FERENS, plaintiff, claims of defendant, DEERE & COMPANY, damages in excess of Ten Thousand ($10,000.00) Dollars.

COUNT III
Albert J. Ferens v. Deere

16. Paragraphs 1 through 15 of this Complaint are incorporated herein by reference as if set forth in full.

17. The defendant Deere is liable in damages to the plaintiff for violation of the laws as incorporated in §402B

of the *Restatement of Torts, 2d* for failure to provide adequate warnings of possible risks and inherent or latent limitations of the Combine.

WHEREFORE, ALBERT J. FERENS, plaintiff, claims of defendant Deere & Company damages in excess of Ten Thousand ($10,000.00) Dollars.

COUNT IV

Margaret L. Ferens v. Deere

18. Paragraphs 1 through 17 are incorporated herein by reference as if set forth verbatim.

19. As a direct and proximate result of the aforesaid acts of the defendant Deere its agents, servants and employees, plaintiff, Margaret L. Ferens, has in the past lost the love, society, companionship, affection, services and consortium of her husband, the plaintiff Albert J. Ferens, all of which may continue for an indefinite period of time in the future.

WHEREFORE, MARGARET L. FERENS, plaintiff, claims of defendant DEERE & COMPANY, damages in excess of Ten Thousand ($10,000.00) Dollars.

BARNETT AND JAMES

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

ALBERT J. FERENS and
MARGARET L. FERENS, his wife — PLAINTIFFS

V. — CIVIL ACTION NO. J85-733(B)

JOHN DEERE COMPANY — DEFENDANT

ANSWER BY JOHN DEERE COMPANY

JURY TRIAL REQUESTED

Comes now John Deere Company (herein at times referred to as "John Deere"), by and through its undersigned counsel of record, and for its Answer and response to the Complaint filed in this cause on or about July 25, 1985, states as follows:

FIRST DEFENSE

Failure to State a Claim

John Deere avers that the Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

Paragraph by Paragraph Answer

Responding paragraph by paragraph to the Complaint, John Deere makes the following admissions, denials and averments:

1.

On information and belief, John Deere admits the allegations in paragraph 1.

2.

John Deere Company admits that it is a corporation organized and existing under and by virtue of the laws of the State of Delaware, that said corporation is registered with the Secretary of State of the State of Mississippi, that it is doing business in the State of Mississippi and that it maintains, as its registered agent, C T Corporation System, 118 North Congress Street, Jackson, Mississippi 39201. John Deere denies all allegations set forth in paragraph 2 except those expressly admitted herein.

3.

John Deere denies that the amount in controversy exceeds the sum of $10,000.00, exclusive of interest and costs. John Deere admits the remaining allegations set forth in paragraph 3.

4.

John Deere admits the allegations set forth in paragraph 4.

5.

John Deere admits that it is in the business of advertising, selling and distributing combines. John Deere denies the remaining allegations set forth in paragraph 5.

6.

John Deere admits that it sold the combine in question to Uniontown Farm Equipment Company, which company thereafter sold the combine to Plaintiff for use on his farm. Except as expresly admitted herein, the Defendant denies the remaining allegations set forth in paragraph 6.

7.

After reasonable investigation, John Deere is without information or knowledge sufficient to form a belief as to the truth of the allegations set forth in paragraph 7, and consequently denies said allegations.

8.

After reasonable investigation, John Deere is without information or knowledge sufficient to form a belief as to the truth of the allegations set forth in paragraph 8, and consequently denies said allegations.

9.

For its response to paragraph 9, John Deere adopts and reasserts all admissions, denials and allegations set forth in paragraphs 1 through 8 above.

10.

John Deere denies the allegations set forth in paragraph 10.

11.

John Deere denies the allegations and averments set forth in paragraph 11. By way of further response, John Deere incorporates herein its response to paragraphs 7 and 8 of the Complaint.

12.

For its response to paragraph 12, John Deere adopts and reasserts all admissions, denials and allegations set forth in paragraphs 1 through 11 above.

13.

John Deere is without information or knowledge sufficient to form a belief as to the truth of the allegations set forth in paragraph 13, and consequently denies said allegations.

14.

John Deere denies the allegations set forth in paragraph 14.

15.

John Deere denies the allegations set forth in paragraph 15. John Deere denies that the Plaintiff is entitled to the damages set forth in the unnumbered paragraph following paragraph 15 at page 5 of the Complaint, or any relief whatsoever.

16.

For its response to paragraph 16, John Deere adopts and reasserts all admissions, denials and allegations set forth in paragraphs 1 through 15 above.

17.

John Deere denies the allegations set forth in paragraph 17. John Deere denies that the Plaintiff is entitled to the relief requested in the unnumbered paragraph following paragraph 17 and appearing at page 6 of the Complaint, or any relief whatsoever.

18.

For its response to paragraph 18, John Deere adopts and reasserts all admissions, denials and allegations set forth in paragraphs 1 through 17 above.

19.

John Deere denies the allegations set forth in paragraph 19. John Deere denies that the Plaintiff is entitled to the relief requested in the unnumbered paragraph following paragraph 19 and appearing at pages 6 and 7, or any relief whatsoever.

THIRD DEFENSE

Statutes of Limitation

John Deere pleads all applicable statutes of limitation.

FOURTH DEFENSE

Contributory Negligence

John Deere pleads contributory negligence as a bar to part, or all, of the Plaintiffs' recovery in this action.

FIFTH DEFENSE

Assumption of the Risk

John Deere pleads assumption of the risk as a bar to the Plaintiffs' recovery in this action.

SIXTH DEFENSE

Misuse

John Deere pleads misuse as a bar to the Plaintiffs' recovery in this action.

SEVENTH DEFENSE

The Plaintiffs' claim is barred by the applicable terms of the purchase order for the Combine which is the subject of this action.

AND NOW HAVING ANSWERED FULLY, the Defendant prays that this civil action be dismissed with prejudice.

Respectfully submitted,

JOHN DEERE COMPANY

By and through its attorneys:

THOMPSON, ALEXANDER & CREWS
118 North Congress Street
Post Office Box 410
Jackson, Mississippi 39205
Telephone (601) 948-4831

/s/ Frank M. Holbrook
Frank M. Holbrook

[Certificate of service omitted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

ALBERT J. FERENS and MARGARET L. FERENS, his wife,	)	
Plaintiffs,	)	
vs.	)	Civil Action No.
JOHN DEERE COMPANY, a/k/a DEERE & COMPANY,	)	J85-0733 (B)
Defendant.	)	

MOTION FOR CHANGE OF VENUE

AND NOW come Plaintiffs, Albert J. Ferens and Margaret L. Ferens, his wife, by and through their attorneys, Barnett and James and Finkel Lefkowitz Ostrow & Woolridge, and move this Court to transfer this action to the United States District Court for the Western District of Pennsylvania, pursuant to Section 1404(a), Title 28 of the United States Code, for the convenience of the parties and witnesses and in the interest of justice as more clearly appears in the Affidavit of Albert J. Ferens, and upon the following grounds:

1. Plaintiffs are individuals who reside in Fayette County, Pennsylvania, Western District of Pennsylvania.

2. The basis of Plaintiffs' Complaint against Defendant arises out of a product liability action, wherein Plaintiffs' allege severe personal injuries in an accident which occurred in the Western District of Pennsylvania. Plaintiffs' claim does not arise out of or have any connection with any acts by the Plaintiffs or Defendant or facts or circumstances arising in this State and this District.

3. Defendant is a Delaware corporation with its principal place of business at John Deere Road, Moline, Illinois and is doing business in the Commonwealth of Pennsylvania and Western District of Pennsylvania.

4. There is pending in the United States District Court for the Western District of Pennsylvania an action filed by the Plaintiffs against Defendant at Civil Action No. 85-1534. Said suit was filed on or about July 3, 1985, and a true and correct copy of the Complaint filed in said suit is attached to the Affidavit of Albert J. Ferens, incorporated herein by reference and marked Exhibit "A" to said Affidavit.

5. The basis of the suit filed in the Western District of Pennsylvania is civil action against the same Defendant for damages under the Uniform Commercial Code and which arises out of the same facts and circumstances upon which the within action is based; namely, plaintiff's loss of his h·.d in the operation of a John Deere Sidehill Combine ·n or about July 5, 1982, on husband-plaintiff's farm in ' ennsylvania.

6. The suit filed in the Western District of Pennsylvania against Defendant and the instant action against Defendant contain common questions of fact and law relating to the accident and defendant's product which was involved in said accident.

7. Defendant, in the Pennsylvania action, has already entered its appearance and is actively pursuing discovery in the form of interrogatories and a deposition. True and correct copies of Pennsylvania counsel's Interrogatories and Deposition Notice are attached hereto,

made a part hereof and marked Exhibits "B" and "C" respectively.

8. Because of said common questions of fact and law and with discovery already initiated in Pennsylvania, the feasibility of consolidation of the two actions is great if the instant action were transferred to the Western District of Pennsylvania and the convenience of the parties would be greatly served by eliminating duplicate time and expense in trying the cases in two jurisdictions.

9. Transfer of the instant action to the Western District of Pennsylvania would also save judicial time and effort and insure that all rights are adjudicated at one time without the likelihood of inconsistent verdicts.

10. A substantial number of witnesses, whose testimony will be material and necessary on the claims and defenses, will be the same in each action and said witnesses reside in or are located within the jurisdiction of the District Court for the Western District of Pennsylvania as follows:

(a) Mr./Mrs. Albert J. Ferens
R. D. #1
Dunbar, PA 15431

(b) William H. White, M.D.
Richard G. Katz, M.D.
3500 Fifth Avenue
Pittsburgh, PA 15213

(c) Mark S. Granick, M.D.
4815 Liberty Avenue
Pittsburgh, PA 15224

(d) William M. Swartz, M.D.
3550 Terrace Street
Pittsburgh, PA 15213

(e) Robert Junk
Smock, PA 15480

11. A substantial amount of documentary records are also located within the jurisdiction of the United States District Court for the Western District of Pennsylvania as follows:

(a) Hospital Records of:
Presbyterian-University Hospital of Pittsburgh
DeSoto at O'Hara
Pittsburgh, PA 15213

(b) Medical Records of:
Connelsville State General Hospital
East Murphy Avenue
Connelsville, PA 15425

(c) Records of:
Office of Vocational Rehabilitation
75 East Maiden Street
Washington, PA 15301

12. To require plaintiff to pursue two separate actions involving common questions of fact and law at

the same time and in Pennsylvania and Mississippi would place an unreasonable burden on Plaintiff.

WHEREFORE, Plaintiff respectfully requests that this Court transfer the instant action to the United States District Court for the Western District of Pennsylvania.

BARNETT AND JAMES

/s/ Faye Murphree James
Faye Murphree James

223 South State Street
Jackson, MI 39201
(601) 354-8627

FINKEL LEFKOWITZ
OSTROW & WOOLRIDGE

/s/ Stanley V. Ostrow
Stanley V. Ostrow

/s/ William A. Penrod
William A. Penrod

800 Commonwealth Building
Pittsburgh, PA 15222
(412) 288-2670

Attorneys for Plaintiffs

[Notice, exhibits and certificate of service omitted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

ALBERT J. FERENS and MARGARET L. FERENS, his wife, Plaintiffs,	)	
vs.	)	Civil Action No.
JOHN DEERE COMPANY, a/k/a DEERE & COMPANY, Defendant.	)	J 85-0733

AFFIDAVIT IN SUPPORT OF MOTION FOR CHANGE OF VENUE

COMMONWEALTH OF PENNSYLVANIA	)	
	)	SS:
COUNTY OF ALLEGHENY	)	

Before me, the undersigned authority, personally appeared Albert J. Ferens, who after being duly sworn according to law did depose and state that:

1. He is a resident of Fayette County, Pennsylvania and Western District of Pennsylvania, and that the facts contained herein are true and correct according to his personal knowledge.

2. He directed his counsel to file Complaints at Civil Action No. 85-1534 in the Western District of Pennsylvania and at Civil Action No. J85-0733 in the Southern District of Mississippi.

3. He is now directing his counsel to remove the said Complaint at Civil Action No. J85-0733 in the Southern District of Mississippi to the Western District of Pennsylvania for the convenience of the parties and witnesses

and in the interest of justice for the reasons set forth in the attached Motion.

4. That the John Deere Sidehill #6620 Combine, Serial No. 454097 was purchased on or about July 17, 1981 in Washington County, Pennsylvania, and is presently located on plaintiff's farm in Fayette County.

5. That an accident occurred on July 5, 1982, in Washington County, Pennsylvania while he was cleaning said Combine and his right hand was traumatically amputated above the wrist.

6. The action against defendant, Deere & Company, in the Western District of Pennsylvania arises out of said accident which occurred on July 5, 1982, and is based on provisions of the Uniform Commercial Code.

7. The basis of the action filed against Defendant in the Southern District of Mississippi was the aforesaid July 5, 1982 accident and is based on strict liability, negligence and breach of warranty by said defendant.

8. That all witnesses with any knowledge of the accident or injuries husband-plaintiff sustained, including doctors, hospital personnel and who plaintiffs will call and use, reside in the Western District of Pennsylvania.

9. That all documents relating to the personal injuries plaintiff sustained are located in the Western District of Pennsylvania.

10. That to simultaneously pursue the Pennsylvania and Mississippi actions as separate lawsuits would be a great cost and expense to him.

11. That the averments of fact as set forth in this Affidavit and Motion to which it is attached are true and correct to the best of affiant's knowledge, information and belief.

/s/ Albert J. Ferens
Albert J. Ferens

SWORN to and subscribed before me
this 20th day of August 1985.

/s/ Theresa A. Griffin
Notary Public

THERESA A. GRIFFIN, NOTARY PUBLIC
PITTSBURGH, ALLEGHENY COUNTY
MY COMMISSION EXPIRES APRIL 24, 1989
Member, Pennsylvania Association of Notaries

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

ALBERT J. FERENS and
MARGARET L. FERENS, his wife PLAINTIFFS

V. CIVIL ACTION NO. J85-733(B)

JOHN DEERE COMPANY, a/k/a
DEERE & COMPANY DEFENDANT

ORDER CHANGING VENUE

THIS CAUSE came on for hearing of the Motion for Change of Venue filed herein by the Plaintiffs, Albert J. Ferens and Margaret L. Ferens, and the Court, having heard argument of counsel for all parties, finds that said motion should be sustained.

IT IS, THEREFORE, ORDERED AND ADJUDGED that this cause be, and it hereby is, transferred to the United States District Court for the Western District of Pennsylvania pursuant to Section 1404(a), Title 28 of the United States Code, for the convenience of the parties and witnesses.

IT IS FURTHER, ORDERED AND ADJUDGED that the Clerk of this Court effectuate the transfer according to law.

ORDERED AND ADJUDGED, this the 8 day of November, 1985.

/s/ John R. Countiss III
JOHN R. COUNTISS, III
UNITED STATES
MAGISTRATE

APPROVED AS TO FORM:

/s/ William R. Barnett
ATTORNEY FOR PLAINTIFFS

/s/ Frank M. Holbrook
ATTORNEY FOR DEFENDANT

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ALBERT J. FERENS and MARGARET L. FERENS, his wife, Plaintiffs,	)	
vs.	)	Civil Action No. 85-1534
DEERE & COMPANY, Defendant.	)	
ALBERT J. FERENS and MARGARET L. FERENS, his wife, Plaintiffs,	)	
vs.	)	Civil Action No. 85-2725
JOHN DEERE COMPANY, a/k/a DEERE & COMPANY, Defendant.	)	

PLAINTIFFS' MOTION FOR CONSOLIDATION OF ACTIONS

AND NOW comes Finkel Lefkowitz Ostrow & Woolridge, attorneys for plaintiffs in the above-captioned cases and herewith files the following Motion for Consolidation of Actions for the reasons hereinafter set forth:

1. The above-captioned cases are actions for damages arising out of an accident which occurred on June 22, 1982, in Fayette County, Pennsylvania, wherein husband-plaintiff received serious personal injuries while working about a John Deere Combine previously purchased by husband-plaintiff.

2. Plaintiffs filed suit against defendant in the United States District Court for the Western District of Pennsylvania at Civil Action No. 85-1534 for damages due to breach of warranties by defendant under the Uniform Commercial Code of Pennsylvania.

3. Plaintiffs also filed suit against defendant in the United States District Court for the Southern District of Mississippi at Civil Action No. J 85-0733(B) for damages due to defendant's negligence and violations as set forth in Restatement of Torts 2d, Sections 402A and 402B.

4. The United States District Court for the Southern District of Mississippi transferred the action at Civil Action No. J 85-0733 to this Court pursuant to Title 28 U.S.C.A. Section 1404(a). Said case now bears Civil Action No. 85-2725.

5. The efficient administration of the aforesaid two actions, as well as the interests of all parties, would be better served by consolidating the two actions.

6. The within actions are related cases, involve common questions of law and fact, and grow out of the same transactions. Consolidation would work no prejudice to defendant.

WHEREFORE, it is respectfully requested that this Honorable Court consolidate the above cases for trial pursuant to Fed.R.C.P. 42(a).

FINKEL LEFKOWITZ OSTROW &
WOOLRIDGE

/s/ Stanley V. Ostrow

/s/ William A. Penrod
Attorneys for Plaintiffs
800 Commonwealth Building
Pittsburgh, PA 15222
(412) 288-2670

[Notice, certificate of service, and proposed order omitted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ALBERT J. FERENS and MARGARET L. FERENS, his wife, Plaintiffs, vs. DEERE & COMPANY, Defendant.	Civil Action No. 85-1534
ALBERT J. FERENS and MARGARET L. FERENS, his wife, Plaintiffs, vs. JOHN DEERE COMPANY, a/k/a DEERE & COMPANY, Defendant.	Civil Action No. 85-2725

ORDER OF COURT

AND NOW, to-wit, this 21st day of November, 1985, in consideration of the within Motion, it is hereby ORDERED that the action of Albert Ferens, et ux v. John Deere Company a/k/a Deere & Company at Civil Action No. 85-2725 be, and hereby is, consolidated with Albert Ferens, et ux v. Deere & Company at Civil Action No. 85-1534 for all purposes.

/s/ Maurice B. Cohill, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ALBERT J. FERENS and MARGARET L. FERENS, his wife,	)	
Plaintiffs,	)	
-vs-	)	C.A. No. 85-2725
JOHN DEERE COMPANY, a/k/a DEERE & COMPANY	)	
Defendant.	)	

DEERE & COMPANY'S MOTION FOR SUMMARY JUDGMENT

Deere & Company moves this Honorable Court to enter summary judgment in its favor in the within action for the following reasons:

1. This action arises from an accident which occurred on or about July 5, 1982 while Albert Ferens was cleaning a combine manufactured by defendant. (Complaint, ¶5 and ¶7)

2. This action was filed on July 23, 1985 in the United States District Court for the Southern District of Mississippi.

3. This action was subsequently transferred to the United States District for the Western District of Pennsylvania under 42 U.S.C. § 1404(a) pursuant to Plaintiffs' Motion for Change of Venue.

4. On plaintiffs' motion this action has been consolidated with another action between the same parties which is pending in the United States District Court for the Western District of Pennsylvania at C. A. No. 85-1534.

5. Plaintiffs reside in Dunbar, Fayette County, Pennsylvania. (Complaint, ¶1; Plaintiffs' Motion for Change of Venue, ¶1)

6. The combine which is the subject of this action was purchased by plaintiff from Uniontown Farm Equipment Company. (Complaint, ¶6)

7. The basis of the action pending at at C. A. No. 85-1534 "arises out of the same facts and circumstances upon which the [present] action is based; namely, plaintiff's loss of his hand in the operation of a John Deere Sidehill Combine on or about July 5, 1982, on husband-plaintiff's farm in Pennsylvania". (Plaintiffs' Motion for Change of Venue, ¶5)

8. Plaintiffs' claim does not arise out of or have any connection with any acts by the plaintiffs or defendant or any facts or circumstances arising in the State of Mississippi or the United States District Court for the Southern District of Mississippi. (Plaintiffs' Motion for Change of Venue, ¶2)

9. This Court's jurisdiction over both the present action and the action at C. A. No. 85-1534 is premised on diversity of citizenship in accordance with 28 U.S.C. § 1332.

10. Under Pennsylvania law Pennsylvania plaintiffs' action would be time-barred by 42 Pa. C.S. § 5524 unless commenced on or before July 5, 1984.

11. The filing of this action in the United States District Court for the Southern District of Mississippi was a subterfuge designed to evade the time bar imposed by 42 Pa. C.S. § 5524.

12. For the reasons set forth more fully in the brief to be filed in support of this motion, this Court may and should apply 42 Pa. C.S. § 5524 to the present action.

13. If 42 Pa C.S. § 5524 is applied to the present action, then defendant is entitled to summary judgment as a matter of law.

WHEREFORE, John Deere Company a/k/a/ Deere & Company moves this Honorable Court to enter judgment in its favor against plaintiffs, and to dismiss the present action with prejudice.

SHARLOCK, REPCHECK & MAHLER

BY: /s/ Gary F. Sharlock
Attorneys for Defendant.

[Certificate of service and proposed order omitted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ALBERT J. FERENS and MARGARET L. FERENS, his wife, Plaintiffs,	)	
v.	)	CIVIL ACTION NO. 85-1534
DEERE & COMPANY, Defendant.	)	

ALBERT J. FERENS and MARGARET L. FERENS, his wife, Plaintiffs,	)	
v.	)	CIVIL ACTION NO. 85-2725
JOHN DEERE COMPANY, a/k/a DEERE & COMPANY, Defendant.	)	

ORDER

AND NOW, to-wit, this 25th day of July, 1986, having carefully considered the allegations in the Complaints in the light most favorable to the Plaintiffs and in accordance with the accompanying Opinion, it is hereby ORDERED, ADJUDGED and DECREED that:

1) Defendant's Motion for Summary Judgment be and hereby is DENIED with respect to the claims brought by C.A. 85-1534;

2) Defendant's Motion for Summary Judgment be and hereby is GRANTED with respect to the claims brought at C.A. 85-2725.

/s/ Maurice B. Cohill, Jr.
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ALBERT J. FERENS and MARGARET L. FERENS, his wife, Plaintiffs, vs. DEERE & COMPANY, Defendant,	CIVIL ACTION NO. 85-1534
ALBERT J. FERENS and MARGARET L. FERENS, his wife, Plaintiffs, vs. JOHN DEERE COMPANY a/k/a DEERE & COMPANY, Defendant.	CIVIL ACTION NO. 85-2725

MOTION FOR CERTIFICATION AND FINAL JUDGMENT UPON LESS THAN ALL CLAIMS PURSUANT TO RULE 54(b) AND REQUEST FOR STAY OF FURTHER PROCEEDINGS AND EXTENSION OF TIME TO APPEAL

AND NOW, comes the plaintiffs, by their attorneys, Finkel Lefkowitz Ostrow & Woolridge, and file this Motion pursuant to F.R.C.P. 54(b) and seeks the court to enter a final judgment in favor of defendant upon the claims set forth at Civil Action No. 85-2725:

1. On July 3, 1985, plaintiffs filed C.A. 85-1534 in the Western District of Pennsylvania, basing their claim on breach of warranty under 13 Pa.C.S. § 1101-9507.

2. On July 25, 1985, plaintiff filed an action in the Southern District of Mississippi, basing their claim on

negligence, strict liability under Restatement Second of Tort § 402 A and B.

3. On November 8, 1985, upon plaintiffs' motion, the Court in the Southern District of Mississippi transferred the case to the Western District of Pennsylvania, where it was designated C.A. 85-2725.

4. By Order of Court dated November 21, 1985, the two actions were consolidated for all purposes.

5. On or about February 17, 1986, pursuant to Rule 56(c) defendant moved for summary judgment against all claims on the grounds that in C.A. 85-1534 the purchase order disclaimed any implied warranties of merchantability and fitness for a particular purpose and contained an exclusion of consequential damages; and plaintiffs' claim at C.A. 85-2725 for negligence and strict liability were barred by the Pennsylvania Statute of Limitation.

6. On July 25, 1985, this Court entered an order denying defendants' Motion for Summary Judgment with respect to the claims of breach of warranty and granting the Motion for Summary Judgment with respect to the claims of negligence and strict liability.

7. Plaintiff requests certification of this Courts July 25, 1985 order on the grounds that no just cause exists for delaying the entry of judgment at C.A. 85-2725.

8. Plaintiffs will suffer hardship and injustice through delay which may prohibit them from bringing an action against defendant in an appropriate forum, which would be alleviated by an immediate appeal.

9. The appellate court would not be obliged to consider the same issue a second time.

10. The need for review of the within appeal would not be mooted by future developments in the District Court on the pending claim at C.A. 85-1534.

11. No claim or counterclaim exists which could result in a setoff against the judgment sought to be made final.

12. Defendant would not be prejudiced by an appeal.

13. The trial court could be obliged to consider the same facts, testimony and issues a second time if plaintiffs succeed on appeal at the conclusion of action on the undismissed claim.

14. In order to protect plaintiffs' rights of appeal, the certification should include an extension of time to appeal wherein plaintiffs have thirty (30) days from the order certifying said judgment to appeal said judgment.

15. A stay of further proceedings of the breach of warranty action would, in event of favorable disposition of plaintiffs' appeal on the negligence and strict liability action, permit judicial economy in that both actions would thereafter be tried together.

WHEREFORE, plaintiffs request certification of the July 25, 1985 order and entry of final judgment on C.A. 85-2725.

FINKEL LEFKOWITZ OSTROW &
WOOLRIDGE

/s/ Stanley V. Ostrow

/s/ William A. Penrod
Attorneys for Plaintiffs

800 Commonwealth Building
Pittsburgh, PA 15222
(412) 288-2670

[Certificate of service and proposed order omitted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ALBERT J. FERENS and MARGARET L. FERENS, his wife, Plaintiffs,	)	
vs.	)	Civil Action No. 85-1534
DEERE & COMPANY, Defendant.	)	
ALBERT J. FERENS and MARGARET L. FERENS, his wife, Plaintiffs,	)	
vs.	)	Civil Action No. 85-2725
JOHN DEERE COMPANY, a/k/a DEERE & COMPANY, Defendant.	)	

PROPOSED ORDER OF COURT

AND NOW, to-wit, this 5th day of September, 1986, in consideration of the within Motion, it is hereby ORDERED that

1. This Court expressly determines that as to the Summary Judgment at C.A. 85-2725, there is no just reason for delay, and therefore entry of final judgment is directed.

2. An extension of thirty (30) days is hereby granted to plaintiffs to file an appeal on the within final judgment.

3. A stay of further proceedings is granted upon C.A. 85-1534 until such time as the issue on appeal is resolved.

BY THE COURT

/s/ Maurice B. Cohill, Jr. J.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ALBERT J. FERENS and MARGARET L. FERENS, his wife,
Plaintiffs,
vs.
DEERE & COMPANY,
Defendant.
) Civil Action No. 85-1534

ALBERT J. FERENS and MARGARET L. FERENS, his wife,
Plaintiffs,
vs.
JOHN DEERE COMPANY, a/k/a DEERE & COMPANY,
Defendant.
) Civil Action No. 85-2725

NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FROM JUDGMENT AND ORDER OF THE DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Notice is hereby given that Albert J. Ferens, and Margaret L. Ferens, his wife, Plaintiffs, above named, hereby appeal to the United States Court of Appeals for the Third Circuit from the Summary Judgment with respect to the claims brought at C.A. 85-2725, final judgment thereon having been entered by Order dated September 5, 1986.

FINKEL LEFKOWITZ OSTROW &
WOOLRIDGE

/s/ Stanley V. Ostrow

DATE: October 2, 1986 /s/ William A. Penrod

Attorneys for Plaintiff

800 Commonwealth Building
Pittsburgh, PA 15222
(412) 288-2670

[redacted]

[redacted]

[redacted]

QUESTIONS PRESENTED FOR REVIEW

1. Did Congress intend 28 U.S.C. §1404(a) to be utilized by plaintiffs as a device to permit litigation of a claim in the forum where that claim arose, when the claim was barred by that forum's applicable statute of limitation?

2. If Congress did so intend, does 28 U.S.C. §1404(a), as applied, exceed the powers which the United States Constitution has conferred upon Congress or impermissibly infringe on the powers which the Constitution reserves to the states?

STATEMENT OF CORPORATE AFFILIATIONS PURSUANT TO RULE 28.1

John Deere Company is a wholly-owned subsidiary of Deere & Company. Deere & Company is a publicly-owned corporation which does not have a parent company. John Deere Company does not have any corporate subsidiaries or affiliates.

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SUMMARY OF ARGUMENT

Petitioners' Tort Action arose in Pennsylvania and would have been barred by Pennsylvania's two year statute of limitations if Petitioners had originally filed the action in Pennsylvania. Petitioners' Tort Action has no connection with Mississippi; it was filed there solely to take advantage of the state's six year statute of limitations. Petitioners' moving to transfer their Tort Action to Pennsylvania is tantamount to originally filing the action in Pennsylvania.

There is no evidence that Congress intended 28 U.S.C. § 1404(a) to be used by plaintiffs as a device to allow litigation in the forum where a plaintiff's claim arose when that forum's statute of limitations would have barred the claim had it originally been filed in the forum. Section 1404(a)'s legislative history discloses that Congress did not specifically consider the choice of law consequences of transfer. To the extent that an intent may be discerned, the Reviser's Note's statement that § 1404(a) was "drafted in accordance with doctrine of forum non conveniens" and the fact that a dismissal on forum non conveniens grounds necessarily changed the applicable choice of law rules to those of the new forum in a subsequently filed action indicate that Congress contemplated that the transferee forum's choice of law rules would apply following transfer.

If Petitioners' interpretation of 28 U.S.C. § 1404(a) is adopted, then § 1404(a), as applied to the facts of the present matter, violates the United States Constitution by imposing a de facto federal statute of limitations for claims arising under state law in which diversity jurisdic-

tion exists. Petitioners' interpretation contradicts the constitutional principles enunciated in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) and its progeny.

ARGUMENT

I. Congress Did Not Intend 28 U.S.C. §1404(a) To Be Utilized By Petitioners To Litigate Their Tort Action In Pennsylvania, Where It Arose, When Pennsylvania's Statute Of Limitations Would Bar The Tort Action Had Petitioners Originally Filed It In Pennsylvania.

Petitioners' personal injury claim against Deere & Company arose in Pennsylvania: Petitioners reside in Pennsylvania; the John Deere combine was purchased by Petitioners in Pennsylvania; and Mr. Perona's accident occurred on his Pennsylvania farm. The claim has no factual connection with the State of Mississippi. Had Petitioners' Tort Action been filed on July 25, 1985 in either a state or federal court sitting in Pennsylvania the action would have been barred by Pennsylvania's two year statute of limitations for personal injuries caused by tortious acts. 42 Pa. C.S.A. §5524(2). Pennsylvania considers its statute of limitations to be procedural and, therefore, generally applicable to actions filed in Pennsylvania. *Delinski v. Raymark Industries, Inc.*, 819 F.2d 377 (3d Cir. 1987). *See Wells v. Simonds Abrasive Co.*, 345 U.S. 514 (1953). By their use of 28 U.S.C. §1404(a) Petitioners have effectively "filed" their Tort Action in Pennsylvania. 28 U.S.C. §1404(a) is silent as to which state's choice of law rules should govern in the case of transfer. In the absence of a clear indication that Congress so intended when it

enacted 28 U.S.C. §1404(a), that section should not be interpreted to allow Petitioners to do indirectly what Pennsylvania's tort statute of limitations and *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945) would prevent them from doing directly.

28 U.S.C. §1404(a) was only a small part of the massive undertaking embodied by the Judicial Code of 1948. The provision was proposed by Professor James W. Moore, who acted as a special consultant to the revision staff of the Judicial Code. 1A(Pt. 2) J. Moore, W. Taggart, A. Vestal, J. Wicker & B. Ringle, *Moore's Federal Practice*, ¶0.345[4.-1] at 4333 (2d ed. 1969). The legislative history of 28 U.S.C. §1404(a) contains nothing to suggest that Congress specifically considered the matter of applicable choice of law rules when it enacted 28 U.S.C. §1404(a).[1]

> The legislative history of the 1948 revision of the Judicial Code shows that Congress failed even to recognize the choice of law problem. In Congressional hearings and debates, Section 1404(a) is mentioned only once, with no attention given to the problem. Furthermore, according to Professor Moore, who proposed §1404(a), the Advisory Committee did not consider the question either. [footnotes omitted]

Note, *Choice of Law After Transfer of Venue*, 75 Yale L.J. 90, 94 (1965).[2]

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[1] The complete legislative history of §1404(a) was included in *Special Pamphlet on PL-773, June 25, 1948, c. 646, 62 Stat. 937*, U.S. Code & Cong. Serv. 80th Cong., 2d Sess. 695 (1948).

[2] Although *Moore's Federal Practice* states, with little analysis, that "it appears that the *Van Dusen* rule should apply after

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The Reviser's Note to 28 U.S.C. §1404 did not expressly address the choice of law issue, stating in relevant part:

> Subsection (a) was drafted in accordance with the doctrine of forum non conveniens, permitting transfer to a more convenient forum, even though the venue is proper. As an example of the need of such a provision, see *Baltimore & Ohio R. Co. v. Kepner*, 1941, 62 S. Ct. 6, 314 U.S. 44, 86 L.Ed. 28 which was prosecuted under the Federal Employers' Liability Act in New York, although the accident occurred and the employee resided in Ohio. The new subsection requires the court to determine that the transfer is necessary for the convenience of the parties and witnesses, and further, that it is in the interest of justice to do so.

The legislative history in which 28 U.S.C. §1404(a) was discussed does not reveal any Congressional intent to overturn the existing rule under which a state or federal court sitting in Pennsylvania would have held Petitioners' Tort Action to be governed by Pennsylvania's statute of limitations in the event that the Petitioners had selected Pennsylvania as the forum in which to litigate their claim.

On March 7, 1947 Professor Moore appeared before House Judiciary Sub-Committee No. 1. With regard to the

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such a [plaintiff-initiated] transfer", *supra*, ¶ 0.345[4.-5] at 4351, that treatise fails to cite any legislative history to support the proposition that the Congress so intended, despite Professor Moore's unique vantage point concerning the enactment of §1404(a). Similarly, Professor Moore's 1949 commentary did not even address the choice of law issue. Moore, *Commentary on the Judicial Code* ¶0.03(29) at 200-211 (1949).

general purpose and scope of the proposed legislation he testified as follows:

> As I see it, the revision involved at least the following problems:
>
> (1) A study of the materials involved in title 28, United States Code, and other materials that were properly related to the Federal judiciary and which should be contained under title 28.
>
> (2) Elimination of deadwood.
>
> (3) Improvement.
>
> The later might have involved far-reaching change. For example, diversity jurisdiction might have been eliminated, as many have advocated. *But the revision has made no basic changes.* [Emphasis supplied]

Hearings before Subcommittee No. 1 of House Committee on the Judiciary on H.R. 1600 and H.R. 2055, 80th Cong., 1st Sess. 27 (1947) Professor Moore then proceeded to comment specifically on various aspects of the H.R. 2055. Regarding venue he testified:

> Venue provisions have not been altered by the revision. Two changes of importance have, however, been made. Improper venue is no longer grounds for dismissal of an action in the Federal courts. Instead the district court is to transfer the case to the proper venue. See Section 1406. And section 1404 introduces an element of convenience which gives the court the power to transfer a case for the convenience of parties and witnesses to another district. Both of these changes were in line with modern State practice; and the provision for change of venue on the grounds of convenience is also embodied in the Bankruptcy Act for corporate reorganization, section 118, Eleventh United States Code, section 518.

Id. at 29.

The report to accompany H.R. 3214 (a later designation of H.R. 2055) alluded to the proposed §1404(a) under the heading "Examples of Changes in Law" as follows: "So also, minor changes were made in the provisions regulating the venue of district courts in order to clarify ambiguities or to reconcile conflicts. These are reflected in the reviser's notes under Sections 1391-1406." H.R. Rep. No. 308, 80th Cong., 1st Sess. 5 (1947).

General remarks regarding the proposed revisions to the Judicial Code also evince the lack of any Congressional intent to make the radical change in choice of law rules which would be effected by Petitioners' interpretation of 28 U.S.C. §1404(a). Thus, the Honorable Albert B. Maris, Chairman of the Judicial Conference committee which was appointed to collaborate with the House Committee on Revision of the Laws (whose work was taken over by the Judiciary Committee) testified:

> [W]e regard the revision as incorporated in H.R. 2055 as having been extremely well done. The existing material has been rearranged in a logical and consistent way so as to make any particular provision quite easy to find. Existing inconsistencies and ambiguities have been removed and obsolete and archaic provisions eliminated or modernized. At the same time care has been taken to make no changes in the existing laws which would not meet with substantially unanimous approval.

Hearings before Subcommittee No. 1 of House Committee on the Judiciary on H.R. 1600 and H.R. 2055, 80th Cong., 1st Sess. 19 (1947). Judge Maris's remarks were echoed by the Senate Judiciary Committee's report on H.R. 3214:

> Many noncontroversial improvements have been effected which, while individually small in themselves, add up to a very substantial improvement in and modernization of the law relating to the Federal judiciary. At the same time great care has been exercised to make no changes in the existing law which would not meet with substantially unanimous approval.

S. Rep. No. 1559, 80th Cong., 2d Sess. 2 (1948).

If Congress had understood that it was enacting legislation which would, in the case of individuals and entities doing business on a nationwide basis, allow plaintiffs with state common law claims to effectively implement the most favorable state choice of law rules as federal law, Respondent submits that the change would scarcely have met "with substantially unanimous approval." On the contrary, such legislation would undoubtedly have been denounced as an unwarranted intrusion into matters which were properly within the discretion of state legislatures and courts. (Congress may be presumed to have been aware of the relative parameters of federal versus state power which had been enunciated in the then-recent decisions in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), *Klaxon Co. v. Stentor Electric Manufacturing Co., Inc.*, 313 U.S. 487 (1941) and *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945).)

Examination of the specific purposes for which 28 U.S.C. §1404(a) was enacted, relative to the forum non conveniens doctrine from which it was derived, also reveals the absence of any Congressional intent that §1404(a) should be interpreted in the manner which Petitioners advocate. Indeed, such an examination supports the contrary conclusion that Congress intended that the

transferee forum's choice of law rules apply following transfer. Two purposes of 28 U.S.C. §1404(a) are beyond dispute: (1) to mitigate the harshest effect of the forum non conveniens doctrine – dismissal – by providing for transfer to a more convenient forum; and (2) to make transfer available in litigation under special venue statutes (such as 45 U.S.C. §56), as well as in actions under the general federal venue statutes. The first purpose is inherent in the statute. The second purpose is established by both the section's plain language and the Reviser's Note referring to *Baltimore & Ohio R. Co. v. Kepner*, 314 U.S. 44 (1941). *Ex Parte Collett*, 337 U.S. 55 (1949).

The applicability of the forum non conveniens doctrine to common law actions for money damages brought in federal court pursuant to diversity jurisdiction was definitively established by the decision in *Gilbert v. Gulf Oil Corp.*, 330 U.S. 501 (1947), but that decision did not create a new doctrine. Dismissal of an action on the basis of forum non conveniens was attended, *inter alia*, by the following consequences: (1) the possible barring of the action in a subsequent forum as the result of the lapse of the new forum's statute of limitations during the pendency of the original action; (2) the inconvenience and expense of re-serving defendants with process; and (3) the dissolution of temporary restraining orders and/or preliminary injunctions. 28 U.S.C. §1404(a)'s substitution of transfer for dismissal avoided each of these effects. There was another consequence of dismissal on forum non conveniens grounds, however, namely a change in the applicable choice of law rules upon re-filing in a new forum, which transfer would not necessarily alter.

The final Reviser's Note stated that 28 U.S.C. §1404(a) was "drafted in accordance with the doctrine of forum non conveniens".[3] The Court has described this Reviser's Note as "authoritative" in interpreting §1404(a). *United States v. National City Lines*, 337 U.S. 78 (1949). In *Ex Parte Collett, supra*, the Court emphasized the frequency with which the reviser's notes were disseminated to the Congress while §1404(a) was under consideration. 337 U.S. at 69-71. The Senate's attention was also drawn to the proposed §1404(a)'s relation to forum non conveniens by testimony referring to the Court's application of that doctrine in *Koster v. Lumberman's Mutual Casualty Co.*, 330 U.S. 518 (1947). *Hearings before the Senate Committee on the Judiciary on H.R. 3214*, 80th Cong. 2d Sess. 71-73 (1948).

Webster's Ninth New Collegiate Dictionary (1985) and the *American Heritage Dictionary of the English Language* (1970) define "accordance" as "agreement, conformity". The change in applicable choice of law rules which attended a forum non conveniens dismissal was a product of the traditional view that in general the applicable choice of law rules were determined by the rules of forum in which an action was litigated. *E.g., Restatement of Conflict of Laws*, §7 (1934). Thus, at least in the case of a

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[3] When §1404(a) initially appeared in the draft revision of the Judicial Code it was accompanied by a reviser's note stating: "Subsection (a) is new. It was drafted in accordance with a memorandum of Mar. 7, 1945, from the author of Moore's Federal Practice, stating that recognition should be given the doctrine of forum non conveniens . . . ". *Ex Parte Collett, supra*, 337 U.S. at 68-69.

plaintiff-initiated §1404(a) transfer, a change of the applicable choice of law rules is appropriate as being "in accordance" with the doctrine of forum non conveniens. Additionally, Congress could have quite reasonably been under the impression that *Erie R. Co.* v. *Tompkins*, *supra*, *Klaxon Co.* v. *Stentor Electric Manufacturing Co., Inc.*, *supra*, and *Guaranty Trust Co.* v. *York*, *supra*, should be taken at face value as requiring district courts to apply the transferee forum's choice of law rules, i.e. those "of the states in which they sit," *Griffin* v. *McCoach*, 313 U.S. 498, 503 (1941), notwithstanding the Court's later characterization of such an interpretation as "superficial". *Van Dusen* v. *Barrack*, 376 U.S. 612, 636 (1964).

Petitioners' arguments in support of their interpretation of 28 U.S.C. §1404(a) are based almost entirely on the circumscribed examination of the legislative intent underlying §1404(a) which is contained in *Van Dusen* v. *Barrack*, rather than upon direct examination of §1404(a)'s legislative history or analysis of its purpose in the context of the forum non conveniens doctrine. Petitioners seize on two statements from *Van Dusen*.[4] The first is that the "legislative background supports the view that §1404(a) was not designed to narrow the plaintiff's venue privilege or to defeat the state-law advantages that might accrue from

[4] Preliminarily one should note that the facts pertaining to initial forum selection in *Van Dusen* contrast sharply with those of the present matter. In *Van Dusen* the action was filed in the United States District Court for the Eastern District of Pennsylvania by Pennsylvania fiduciaries representing the estates of Pennsylvania decedents who died on a flight bound for Philadelphia. 376 U.S. at 613-614.

the exercise of this venue privilege but rather the provision was simply to counteract the inconveniences that flowed from the venue statutes by permitting transfer to a convenient federal court. The legislative history of §1404(a) certainly does not justify the rather startling conclusion that one might 'get a change of law as a bonus for a change of venue.' " [footnotes omitted] *Van Dusen* v. *Barrack*, *supra*, 376 U.S. at 635-636. Secondly, Petitioners rely on the Court's (expressly restricted) conclusion "that a change of venue under §1404(a) generally should be, with respect to state law, but a change of courtrooms." [footnote omitted] *Van Dusen* v. *Barrack*, *supra*, 376 U.S. at 639. Petitioners then argue that the foregoing considerations weigh just as strongly in favor of applying the transferor forum's choice of law rules in the case of a plaintiff-initiated transfer.[5] If so, and if no other factors

[5] Later, in passage worthy of Lewis Carroll, Petitioners attempt to recast the facts of the present case into the *Van Dusen* mold: "By not opposing the transfer and then seeking to have the case dismissed in Pennsylvania because of Pennsylvania's statute of limitations, Respondent has essentially used a Section 1404(a) transfer to defeat the state law advantages which had accrued to the Petitioners from the proper exercise of their venue privilege. *Van Dusen* teaches that such a use of §1404(a) is improper." (Petitioners' brief at 23 n. 13). Petitioners' repeated reference to Respondent's non-opposition to the motion to transfer venue is the reddest of herring. There was no legitimate reason to oppose the transfer motion. The only basis for opposing the motion would have been a desire to gain some tactical advantage from Petitioners' intentional choice of an inconvenient forum by virtue of Respondent's superior financial resources. The fact that there was no legitimate reason for opposing transfer simply underscores the absolute lack of any connection between the Tort Action and the State of Mississippi.

are to be considered, why was the Court in *Van Dusen* at pains to limit its holding to defendant-initiated transfers?

One obvious answer is that the Court foresaw the possibility of just the sort of manipulative use of 28 U.S.C. §1404(a) by a plaintiff which the district court and the Third Circuit have refused to countenance in the present action. In such circumstances there would not be any reason for *Erie* purposes to treat Mississippi as the state of filing. Additionally, it may be that the Court realized that the nature of its analysis of legislative intent, which was essentially based on a view that the absence of evidence to demonstrate an intent that there should be a change of law following defendant-initiated transfer supported the contrary proposition that Congress positively intended that there should not be a change of law, could well dictate the opposite result, i.e. application of the choice of law rules of the transferee forum, in the event of a plaintiff-initiated transfer. The preceding portions of this brief demonstrate that there is even less support for the view that Congress intended §1404(a) to be interpreted as desired by Petitioners, than *Van Dusen* found for the proposition that Congress intended a defendant-initiated transfer to result in application of the choice of law rules of the transferee forum. Thus, the decisions by the district court and Third Circuit in this case are consistent with *Van Dusen*'s unwillingness to allow a manipulative use of §1404(a) in the face of that section's less than conclusive legislative history.

Although *Van Dusen*'s general approach to statutory construction comports with the view that the transferee forum's choice of law rules should apply in the case of a

plaintiff-initiated transfer, Respondent doubts the correctness of that portion of the Court's opinion which stated that the "legislative background supports the view that §1404(a) was not designed . . . to defeat the state-law advantages that might accrue from the exercise of [plaintiff's] venue privilege . . . ". 376 U.S. at 635. Respondent respectfully questions how the failure to enact the Jennings bill pertaining to the Federal Employers' Liability Act evinces a Congressional intent to preserve the state-law advantages which might accrue as the result of the plaintiff's opportunity to select the original forum. Section 1404(a) was, after all, "drafted in accordance with the doctrine of forum non conveniens" which operated to destroy such advantages. The difficulty with this aspect of the *Van Dusen* opinion has been aptly described:

> As [Justice] Goldberg set up the problem, the failure to find specific congressional intent to abridge plaintiff's so-called right is taken as support for the opposite intent. However, the major premise that plaintiffs acquire rights to a system of law has been shown vulnerable to attack; the legislative history of §1404(a), as has been noted, is a virtual blank; no one intended anything about applicable law after transfer. [footnotes omitted]

Note, *Choice of Law After Transfer of Venue*, *supra*, 75 Yale L.J. at 123. To the extent that Congressional intent may be discerned from either the legislative history or the purpose of §1404(a), that evidence supports the application of the transferee forum's choice of law rules in all cases, as being in accordance with both the doctrine of forum non conveniens and the straightforward reading of *Erie* and its progeny.

Petitioners also complain that application of the choice of law rules of the transferee forum will result in a "less diligent"[6] "plaintiff's being able to use 28 U.S.C. §1404(a) as a forum shopping device to obtain the application of a more favorable law." (Petitioner's brief at 24) The specter of the so-called "blundering plaintiff" is thus raised as an argument for rewarding the "clever plaintiff"[7] by interpreting 28 U.S.C. §1404(a) in a manner which is unsupported by either legislative history or the purpose of §1404(a). As the Third Circuit correctly observed, "allowing plaintiffs to correct a choice of venue error is less problematic than allowing plaintiffs to bootstrap favorable law into a forum." (Petition for a Writ of Certiorari at A. 12). This is so for two basic reasons. First, a blundering plaintiff who obtains a transfer in order to avoid the bar of the original forum's statute of limitations is doing nothing which could not have been accomplished had he or she either originally commenced the action in the transferee forum, or simply dismissed the original action and filed a second action in the transferee forum. Therefore, application of the transferee forum's choice of law rules is not objectionable as a change in status quo ante-Judicial Code of 1948 which is unsupported by Congressional intent. Second, the blundering

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[6] Using their skewed logic, Petitioners, having waited more than a year beyond the lapse of their home state's applicable statute of limitations, are presumably transformed into diligent plaintiffs by spuriously filing in a forum with no connection with the litigation.

[7] Note, *Choice of Law in Federal Courts after Transfer of Venue*, 63 Cornell L. Rev. 149, 156 (1977).

plaintiff does not have an unfettered right to obtain transfer merely because the application of the transferee forum's choice of law rules would be favorable. As a threshold matter, transfer will not be granted unless to do so would be for the convenience of the parties and witnesses. *Delinski v. Raymark Industries, Inc.*, 819 F.2d 377, 383 (3d. Cir. 1987) (Becker, J., concurring). *O'Brien v. Lake Geneva Sugar Shack, Inc.*, 585 F. Supp. 273 (N.D. Ill. 1984). Furthermore, the transferee forum will usually have a more significant relationship to the litigation, making the application of its choice of law rules more appropriate.

The harm, if any, created by the prospect that a blundering plaintiff will occasionally be able to use 28 U.S.C. §1404(a) to obtain relief from an improvident selection of original forum pales beside the pernicious results which adoption of Petitioners' construction of §1404(a) would produce. Litigants with claims which are time-barred in the forum in which they arose would no longer be deterred by the inconvenience and expense of litigating their claims in distant jurisdictions whose sole recommendation as a forum is a favorable statute of limitations. The statement in Judge Seitz's dissenting opinion that the Ferenses "had no choice [but to file in Mississippi] at the time they decided to sue" (Petition for a Writ of Certiorari at A-15) ignores several important alternatives. Petitioners' obvious choice would have been to file a claim in Pennsylvania within two years after July 5, 1982. Having failed to do so, the Ferenses could simply have foreborne the filing of any action. Unhappily, in the present day climate the right to seek redress for an alleged wrong has now apparently become a legal obligation in some eyes. Yet, not every person who believes that

he or she has been injured by the wrongful act of another is willing to file suit anywhere in the United States so long as a forum exists in which personal jurisdiction and venue are proper, and the statute of limitations has not lapsed. Some will bear their misfortunes in such circumstances without filing suit, after weighing in the balance the merits of the claim and the severity of the injury as against the inconvenience of proceeding in a distant forum. If Petitioners' interpretation of 28 U.S.C. §1404(a) is adopted, then such persons no longer need consider the inconvenience which will attend litigation of their state claims. Alternatively, the Petitioners could have elected to limit their attempts to recover to the timely filed Warrant; Action.

Moreover, a ruling in Petitioners' favor could stimulate many filings in inconvenient forums for the purpose of capturing favorable "procedural" choice of law rules other than those relating to the statute of limitations. Such choice of law rules may include those governing burden of production, presumptions, burden of persuasion, sufficiency of evidence, competency of witnesses, and statute of frauds. *See Restatement (Second) Conflict of Laws*, §§126-141 (1971). R. Leflar, *American Conflicts Law*, §§ 121-126 (3d ed. 1977). Although such rules are considered to be procedural by the original forum, and thus applicable even to claims governed by foreign substantive law, they may well so affect the outcome of litigation that *Erie* requires their application in diversity actions. *See Cities Service Oil Co. v. Dunlap*, 308 U.S. 208 (1939). In the past plaintiffs' counsel have undoubtedly been deterred from brazenly attempting to capture such favorable choice of law rules by the prospects that the defendant might elect not to seek transfer, thereby subjecting plaintiff to the inconvenience of litigating in a distant forum; or, at best, of having incurred the expense of a distant filing without the guarantee that the transferor forum's choice of law rules would apply following a plaintiff-initiated transfer.

In *Van Dusen v. Barrack*, *supra*, the Court buttressed its conclusion that 28 U.S.C. §1404(a) was not intended to be used by defendants to obtain a favorable change of law by citing the then recently published tentative draft of the American Law Institute's *Study of the Division of Jurisdiction between State and Federal Courts*. 376 U.S. at 637 n. 36. The final text of the ALI study provides in the case, *inter alia*, of a plaintiff-initiated transfer under 28 U.S.C. §1404(a) that:

> To the extent that a district court is obliged to apply the law of a particular State, including rules with respect to refusal to adjudicate the merits of a controversy and rules for selecting the applicable rule of decision, the court to which an action is transferred under this section shall apply the same law that it would have applied had the action been commenced in that court.

American Law Institute, *Study of the Division of Jurisdiction between State and Federal Courts*, §1306(c) (1969).* The comment to the preceding section states:

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* The non-enactment of S. 1876, proposing to adopt the entire ALI study as law, has no significance. Section §1306(c) was only of a very minor part of that bill (which of course also included §1305(b) proposing to codify *Van Dusen*'s holding).

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> This subsection resolves the choice-of-law problem when an action is transferred on motion of the plaintiff, or is transferred in lieu of being dismissed, by providing that the state law which the transferee court, is obliged to apply shall be that of the state in which it sits. This treatment of the problem is the opposite from that provided in §1305(b) when the defendant is the moving party. The governing principle there was that the defendant ought not by resort to the transfer device to be able to frustrate any choice-of-law advantage which the plaintiff might gain from his choice of forum. When transfer is granted in lieu of dismissal or when the plaintiff for some other reason is seeking a transfer, he ought not to carry with him the choice-of-law advantage resulting from his initial choice of forum, even if that choice was made without full knowledge of the facts.

Id., at 155. Citing the ALI study, the District of Columbia Circuit has commented that "[a] strong argument, however, favors application of the law of the transferee state in such instances." *In Re Korean Air Lines Disaster of September 1, 1983*, 829 F.2d 1171, 1173 n. 4 (D.C. Cir. 1987)(dictum). The 1976 edition of *Federal Practice & Procedure* also opined that following a §1404(a) transfer on plaintiff's motion "it seems that the law of the transferee state should control." 15 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure*, §3846 at 234 (1976). The most recent edition of that treatise takes the same view, but

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The probable reason for the failure to enact the bill lies in its controversial proposals regarding diversity jurisdiction. The non-enactment cannot seriously be regarded as an indication of Congressional attitudes toward applicable choice of law rules in the case of either plaintiff-initiated or defendant-initiated transfers.

notes: "Although much can be said for applying the law of the transferee state when it is plaintiff who has moved [citing the ALI study], the cases seem increasingly to be applying the law of the transferor court regardless of which party moved for transfer if that court was proper in terms of venue and personal jurisdiction." [footnotes omitted] 15 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure*, §3846 at 367 (2d ed. 1986).

While opinions by the Sixth Circuit, Ninth Circuit and Eleventh Circuit (as well as a superceded Seventh Circuit opinion) have stated that the transferor forum's choice of law rules should apply in the case of all §1404(a) transfers in which personal jurisdiction and venue are proper, those opinions are not persuasive on that point for several reasons. In the first place the opinions involved factual situations in which transfer was probably granted pursuant to 28 U.S.C. §1406(a), or involved §1404(a) motions where personal jurisdiction was lacking over the defendant. *Martin v. Stokes*, 623 F.2d 469, 473 n. 5 (6th Cir. 1980). *Nelson v. International Paint Co.*, 716 F.2d 640, 643 (9th Cir. 1983). The defendant also contended that personal jurisdiction was lacking in *Roofing & Sheet Metal Services, Inc. v. LaQuinta Motor Inns, Inc.*, 689 F.2d 982 (11th Cir. 1982). The cases all hold (consistent with §1306(c) of the ALI study) that in such circumstances the transferee forum's choice of law rules should apply so that the "clever plaintiff" will not be able to use either §1404(a) or §1406(a) to capture a favorable choice of law rule which would not otherwise have been applied in the transferee forum. None of the opinions, other than that in *Martin v. Stokes*, contained much discussion attempting to support the conclusion that the transferee

forum's choice of law should apply following a plaintiff-initiated transfer where personal jurisdiction and venue were proper in the transferee forum.[9] The reasoning of *Martin v. Stokes*, however, suffers from the same weaknesses as those in Petitioners' argument which have already been pointed out.

Thus, in *Martin v. Stokes* the Sixth Circuit relied upon that portion of the *Van Dusen v. Barrack* opinion which concluded that "the history and purposes of §1404(a) indicate that it should be regarded as a federal judicial housekeeping measure" 376 U.S. at 637, without conducting any inquiry as to why the Court expressly limited its holding to cases involving defendant-initiated transfers. Similarly, the Sixth Circuit failed to look beyond *Van*

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[9] Thus, the Ninth Circuit simply stated, in what was clearly dictum: "In the former case [of transfer for convenience pursuant to 28 U.S.C. §1404(a)], we must apply the law of the transferor court to prevent parties from seeking a change of venue to take advantage of more favorable laws in another forum. See *Van Dusen v. Barrack*, 376 U.S. 612 (1964)." 716 F.2d at 643. The Eleventh Circuit's entire discussion was as follows: "The concern for uniformity of results achievable by suing in state and federal courts, however, is equally pressing when transfer is not on defendant's motion." [citations omitted] 689 F.2d at 991 n. 14. Similarly, the Seventh Circuit's superceded opinion merely held: "However, when a plaintiff has exercised his choice of forum in the first instance by selecting a permissible forum, the state law of that forum should govern the action regardless of which party initiates a transfer. *Martin v. Stokes*, *supra*, 623 F.2d at 473. Because we agree that such an approach to plaintiff-initiated transfers under 28 U.S.C. §1404(a) compliments the policy underlying the *Van Dusen* rule, we adopt that approach here." *Gonzalez v. Volvo of America Corp.*, 734 F.2d 1221, 1225 (7th Cir. 1984).

Dusen v. Barrack's pronouncements to ascertain whether Congress intended that the law of the transferee forum should apply following a plaintiff-initiated §1404(a) transfer. Finally, the Sixth Circuit was unduly concerned with the benefit which might be conferred upon the blundering plaintiff by interpreting §1404(a) as requiring application of the transferee forum's choice of law rules following a plaintiff-initiated transfer. 623 F.2d at 472 and 473. Neither *Martin v. Stokes*, nor any of the other decisions upon which Petitioners rely, have adequately considered the practical effects of "allowing plaintiffs to bootstrap favorable law into a forum" or, more importantly, whether Congress intended that 28 U.S.C. §1404(a) should be utilized in such a manner.

The better reasoned approach, and that which is most consistent with the Congressional intent regarding applicable choice of law rules is that taken by the Third Circuit in this case, as well as by those district courts which have refused to allow plaintiffs to employ §1404(a) to transport a favorable statute of limitations after intentionally filing in an inconvenient forum, *Jenkins v. Armstrong World Industries, Inc.*, 643 F. Supp. 17 (D. Idaho 1985)[10], or those which have indicated that the statute of limitations of the transferee forum may be applied where plaintiff has

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[10] "[A] number of noted scholars have indicated that the *Van Dusen* rule should not apply where the plaintiff has intentionally selected an inconvenient forum, where the state courts of the transferor district would have dismissed the action based on forum non conveniens, or where the state courts of the transferor court would not have personal jurisdiction over the defendant, or where the transfer was made on plaintiff's motion." [footnote and citations omitted] 643 F. Supp. at 21.

improvidently selected an inconvenient original forum whose statute bars the action. *O'Brien v. Lake Geneva Sugar Stack, Inc.*, 585 F. Supp. 273 (N.D. Illinois 1984), *Leo Schwinsky Motors, Inc. v. Chrysler Motors Corp.*, 270 F. Supp. 418 (E.D. Cal. 1967). *See also* Smith v. *Morris & Manning*, 657 F. Supp. 180 (S.D.N.Y 1987).

II. If 28 U.S.C. §1404(a) Requires Application Of The Transferee Forum's Choice Of Law Rules In The Case Of Diversity Actions Transferred On Plaintiff's Motion, Then The Statute, As So Interpreted, Exceeds The Powers Of Congress Under The United States Constitution And Impermissibly Infringes Upon The Powers Reserved To The States By The Constitution.[11]

In *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78-79 (1938) the Court declared:

> Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts. . . . [T]he Constitution of the United States . . . recognizes and preserves the autonomy and independence of the States – independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the States is in no case permitted except as to matters by the Constitution specially authorized or delegated to the United States.

In *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945) the Court concluded that the principles upon which *Erie R. Co. v. Tompkins* was based required federal district courts hearing diversity actions, whether on the law or equity side, to apply the statute of limitations which would have been applied by courts of the forum state in which the federal court sat. The Court reached its conclusion despite arguments that the statute of limitations should be considered as a mere matter of "procedure". Thus, the Court stated:

> It is therefore immaterial whether statutes of limitation are considered either as "substantive" or "procedural" in State court opinions in any use of those terms unrelated to the specific issue before us. *Erie R. Co. v. Tompkins* was not an endeavor to formulate scientific legal terminology. It expressed a policy that touches vitally the proper distribution of judicial power between State and federal courts. In essence, the intent of that decision was to ensure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court. The nub of the policy that underlines *Erie R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a

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[11] Because 28 U.S.C. §2403(a) may be applicable in light of this argument three copies of Respondent's brief are being served on the Solicitor General pursuant to Supreme Court Rule 28.4(b). Proof of service will be filed separately by counsel for Respondent.

> State court a block away should not lead to a substantially different result. . . . Plainly enough, a statute that would completely bar recovery in a suit if brought in a State court bears on a State-created right vitally and not merely formally or negligibly. As to consequences that so intimately affect recovery or non-recovery a federal court in a diversity case should follow State law.

Guaranty Trust Co. v. York, *supra*, 326 U.S. at 109-110. Subsequently, the Court distilled the foregoing principles into the so-called "twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Hanna v. Plumer*, 380 U.S. 460, 468 (1965).

Pennsylvania has a strong policy of closing its courts to litigation which is time-barred under its tort statute of limitations. *Ross v. Johns-Manville Corp.*, 766 F.2d 823, 827 (3d Cir. 1985). If Petitioners' interpretation of 28 U.S.C. §1404(a) is adopted, then Mississippi's statute of limitation will, by virtue of the accident of federal diversity jurisdiction, be transmuted into the Pennsylvania statute of limitations for a cause of action which arose in Pennsylvania. As the result of its not being a Pennsylvania citizen, Respondent will be required to defend Petitioners' Tort Action in the federal courts of Pennsylvania even though that action could not have been pursued against Respondent in either Pennsylvania state or federal courts had Respondent been a Pennsylvania resident. Such a result flatly contradicts *Erie's* principles regarding both inherent constitutional limitations on federal power and the restraints imposed by the Equal Protection Clause of the Fourteenth Amendment. *Van Dusen's* application of *Erie* supports the conclusion that 28 U.S.C. §1404(a) should not be used by either party to achieve a different outcome depending on whether the case is tried in state or federal court. Similarly, Respondent's analysis of the import of *Erie* for Petitioners' attempted use of §1404(a) is consonant with the restrained view of federal judicial power under the Due Process Clause and Full Faith and Credit Clause which imbued the Court's recent decision in *Sun Oil Co. v. Wortman*, ___ U.S. ___, 108 S. Ct. 2117 (1988).

CONCLUSION

For the foregoing reasons the judgment of the United States Court of Appeals for the Third Circuit should be affirmed.

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DATED: July 31, 1989

SUPREME COURT, U.S.
FILED
AUG 29 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1512

In The

Supreme Court of the United States

October Term, 1988

ALBERT J. FERENS and
MARGARET L. FERENS, his wife,

Petitioners,

vs

JOHN DEERE COMPANY, a/k/a
DEERE & COMPANY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF FOR PETITIONERS

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QUESTION PRESENTED FOR REVIEW

Whether a district court to which a case has been transferred pursuant to 28 U.S.C. §1404(a) is obligated to apply the state law that would have been applied if there had been no transfer where the transfer is from a court having proper venue and jurisdiction and the transfer has occurred as the result of an unopposed motion by the plaintiff.

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For The Third Circuit

REPLY BRIEF FOR PETITIONERS

ARGUMENT

I. The Legislative Background Of Section 1404(a) Supports The View That It Was Not Designed To Defeat The State-Law Advantages Accruing From The Exercise Of A Plaintiff's Venue Privilege

Although acknowledging that the legislative history of 28 U.S.C. §1404(a) does not directly address the question of which state's law should be applied following a transfer, the Respondent claims support for its position in the Reviser's Note following Section 1404. The Note indicates that Section 1404(a) "was drafted in accordance with the doctrine of forum non conveniens, permitting transfer to a more convenient forum, even though the venue is proper." Arguing that a *forum non conveniens* dismissal necessarily resulted in a change in the applicable law when the case was refiled in the more convenient forum, the Respondent concludes that to be "in accordance" with the doctrine of *forum non conveniens*, Section 1404(a) must also require a change in the applicable law. These contentions are without merit.

This Court has repeatedly recognized that Section 1404(a) was not a codification of the common law doctrine of *forum non conveniens*, but was intended to be a revision thereof. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 253 (1981); *Norwood v. Kirkpatrick*, 349 U.S. 29, 31-32 (1955).

> The *forum non conveniens* doctrine is quite different from Section 1404(a). . . .[Section 1404(a)'s] words should be considered for what they say, not with preconceived limitations derived from the *forum non conveniens* doctrine.

Norwood v. Kirkpatrick, 349 U.S. at 31, quoting with approval from *All States Freight, Inc. v. Modarelli*, 196 F.2d 1010, 1011 (3rd Cir. 1952).

Indeed, this Court has specifically stated that Section 1404(a) was drafted, at least in part, to provide relief from the harsh effects of a dismissal under the doctrine of *forum non conveniens*. *Hoffman v. Blaski*, 363 U.S. 335, 335-336 (1960). To the extent that the dismissal of a case on *forum non conveniens* grounds resulted in the action's being barred in the subsequent forum, this would be one of the harsh effects of dismissal which Congress sought to eliminate.

> [The *forum non conveniens*] doctrine involves the dismissal of a case. . . . It is quite naturally subject to careful limitation for it not only denies the plaintiff the generally accorded privilege of bringing an action where he chooses, but makes it possible for him to lose out completely, through the running of the statute of limitations in the forum finally deemed appropriate. Section 1404(a) avoids this latter danger.

Norwood v. Kirkpatrick, 349 U.S. at 31, quoting with approval from *All States Freight, Inc. v. Modarelli*, 196 F.2d at 1011. Contrary to the Respondent's contentions, Section 1404(a) was not intended to be a codification of the doctrine of *forum non conveniens*, but was intended instead to alleviate the harsh effects of a dismissal thereunder.

However, even assuming *arguendo* that Section 1404(a) was a mere codification of the doctrine, it does not necessarily follow that a change in the applicable law is required in order to keep Section 1404(a) transfers "in accordance" with the doctrine of *forum non conveniens*.

Courts in many states, including Mississippi, have required the waiver of an applicable statute of limitations defense available in another state before they will dismiss a case properly brought in their own court.

> [T]here is one classic instance when the doctrine of forum non conveniens will never be applied, and that is to dismiss a case if it is barred elsewhere by a statute of limitations, unless or until the defendant is willing to stipulate that he will waive the statute of limitations defense.

Shewbrooks v. A.C. and S. Inc., 529 So.2d 557, 562 (Miss. 1988)(citing supporting authority from fourteen other jurisdictions including Pennsylvania). To be "in accordance" with this aspect of the *forum non conveniens* doctrine, no change in the applicable law would be warranted following a Section 1404(a) transfer. The Reviser's Note, therefore, provides no support for the Respondent's contentions.

Instead, what meager legislative history there is supports this Court's conclusion in *Van Dusen v. Barrack*, 376 U.S. 612, 635 (1964), that Section 1404(a) "was not designed to narrow the plaintiff's venue privilege or to defeat the state-law advantages that might accrue from the exercise of this venue privilege." At the time Congress was considering the Judicial Code of 1948, which contained Section 1404(a), it was aware of problems arising from broad federal venue provisions, particularly those under the Federal Employers' Liability Act. *Id.*, 376 U.S. at 635. While the Judicial Code was pending, Congress considered and rejected the Jennings bill which would have drastically limited the forums available for cases under the Liability Act. *Id.*, 376 U.S. at 635. Thus,

Congress affirmatively expressed its intent to continue to provide plaintiffs with broad venue rights while ameliorating any resulting inconvenience or unfairness through the availability of Section 1404(a) transfers. Because of this legislative background and the statute's stated intent to have cases tried at locations called for by considerations of convenience and justice, this Court correctly concluded that Section 1404(a) should be regarded as a federal judicial housekeeping measure dealing only with the placement of litigation, and intended simply to authorize a change of courtrooms. *Id.*, 376 U.S. at 636-637. Consequently, no change in the applicable law is warranted when a case is transferred. *Id.*, 376 U.S. at 639.

The Respondent contends, however, that the result should be different with respect to plaintiff-initiated transfers[1] and expresses concern about litigants, with claims which are time-barred in the forum in which they arose, filing suits in distant jurisdictions whose sole recommendation as a forum is a favorable statute of limitations. Similarly, Amicus Curiae, Product Liability Advisory Council (hereinafter "PLAC"), devotes virtually

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[1] The Respondent implies that this Court's limitation of its *Van Dusen* holding to defendant-initiated transfers is support for a different result with respect to plaintiff-initiated transfers. This Court, however, does not decide questions which are not before it on certiorari. *See Mazer v. Stein*, 347 U.S. 201, 208 (1954); *National Licorice Co. v. National Labor Relations Board*, 309 U.S. 350, 357 n.2 (1940). The question of the law to be applied following a plaintiff-initiated transfer was most definitely not before the Court in *Van Dusen*. This Court's reservation of judgment in *Van Dusen* with respect to this issue cannot, therefore, be construed as support for the Respondent's position.

its entire brief to expressing concern that anytime there is a procedural or choice of law advantage in a state in which a given defendant is subject to jurisdiction, plaintiffs will file suit there regardless of that state's lack of nexus or connection to the particular cause of action involved. It is important to recognize, however, that a plaintiff's ability to file suit in any particular forum and have that forum's law applied is not based upon, nor enhanced by, Section 1404(a). The concerns of the Respondent and PLAC in this regard only relate to the statutory and decisional laws of the various states which allow the filing of such lawsuits and provide for the application of the local forum's laws. Section 1404(a) has no impact upon these laws.

Section 1404(a) comes into play only if the plaintiff or the defendant seeks a transfer. Even then the application or non-application of the transferor state's law after a transfer will have no effect upon the continued ability of other plaintiffs to pursue claims in the transferor state. To the extent that a defendant feels there is unfairness to him in allowing a transfer with the continued application of the transferor state's law, he should raise an "interest of justice" objection to the motion for a change of venue, as urged by Amicus Curiae, Pfizer, Inc. (hereinafter "Pfizer"). However, a defendant's dissatisfaction with the wisdom of the transferor state's law is not a relevant consideration for determining whether the transferor state's law should be applied after a transfer.

II. Application Of The Law Of The Transferor State Following The Transfer Of A Case Upon The Motion Of A Plaintiff Is Not Contrary To The United States Constitution

The Respondent argues that it would be unconstitutional to interpret Section 1404(a) as permitting the application of the transferor state's law after a plaintiff-initiated transfer. The Respondent contends that the constitutional principles enunciated in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) and *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945) require a federal district court hearing a diversity action to apply both the law and the statute of limitations which would have been applied by the courts of the forum state in which the federal court sits.

If this were so, these same principles would also require the application of the transferee state's law following defendant-initiated transfers. In *Van Dusen*, however, this Court held that the law of the transferor state must be applied following a defendant-initiated transfer. *Van Dusen v. Barrack*, 376 U.S. at 639. The Court had no difficulty in reconciling the *Erie* doctrine with its decision to apply the law of the transferor state.

> [O]ur interpretation of [Section 1404(a)] fully accords with and is supported by the policy underlying *Erie R. Co. v. Tompkins*, 304 U.S. 64. This Court has often formulated the *Erie* doctrine by . . . declaring that federal courts in diversity of citizenship cases are to apply the laws "of the states in which they sit," [citation omitted]. A superficial reading of these formulations might suggest that a transferee federal court should apply the law of the State in which it sits rather than the law of the transferor State. Such a reading, however, directly contradicts

the fundamental *Erie* doctrine which the quoted formulations were designed to express. . . . Applying [the Court's analysis in *Guaranty Trust*] to § 1404(a), we should ensure that the "accident" of federal diversity jurisdiction does not enable a party to utilize a transfer to achieve a result in federal court which could not have been achieved in the courts of the State where the action was filed. . . . What *Erie* and the cases following it have sought was an identity or uniformity between federal and state courts; and the fact that in most instances this could be achieved by directing federal courts to apply the laws of the States "in which they sit" should not obscure that, in applying the same reasoning to § 1404(a), the critical identity to be maintained is between the federal district court which decides the case and the courts of the State in which the action was filed. [footnotes omitted]

Van Dusen v. Barrack, 376 U.S. at 637-639.

The Respondent's contentions would only have merit if the *Erie* decision was founded upon a constitutional provision requiring all federal courts sitting in diversity to apply the law of the state in which the federal court was physically located. No such constitutional provision exists. In *Erie* this Court was concerned with federal district courts declaring substantive rules of common law applicable in a particular state without giving deference or consideration to the decisions of that state's highest court. The Court viewed such conduct as a usurpation of the powers reserved to the states by the United States Constitution.

> Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.

Erie R. Co. v. Tompkins, 304 U.S. at 78. Thus, the constitutional mandate upon which *Erie* is based is not that a federal court must apply the law of the state in which it is physically located. Rather, *Erie* is based upon the constitutional prohibition of a federal court's usurpation of the power of a particular state to declare its own law through the decisions of its highest court.

Requiring a transferee federal court to apply the law of the transferor state does no violence to this constitutional prohibition. The transferee court is not creating a federal general common law and declaring it to be the applicable law of the state in which the court is sitting. Because the transfer is, with respect to state law, nothing more than "a change of courtrooms", *see Van Dusen v. Barrack*, 376 U.S. at 639, the transferee federal district court is sitting as though it were a federal district court in the state where the lawsuit was originally filed. The transferee court will be applying the substantive law of the state where the lawsuit was filed, not some federal general common law. The transferee court's application of the transferor state's law will not be a declaration that the transferor state's law is the applicable law of the transferee state, but only a determination of the applicable law in the state where the lawsuit was filed. There is,

therefore, no usurpation of the forum state's power to declare its own laws. Furthermore, uniformity will be maintained between the results attainable in the transferee federal court and the state courts where the lawsuit was filed. Thus, in the present case, the Pennsylvania District Court's application of Mississippi law following a Section 1404(a) transfer will not contravene any of the constitutional principles enunciated in *Erie*.

Moreover, because the court will be applying Mississippi law, its application of Mississippi's statute of limitations, as expressly permitted in Mississippi pursuant to that state's decisional and statutory law, will not violate either the Due Process Clause or the Full Faith and Credit Clause of the United Suates Constitution. A state's application of its own statute of limitations to a cause of action which arose in another state, and may otherwise be governed by the laws of that other state, is not unconsitutional. *Sun Oil Co. v. Wortman*, ___U.S.___, 108 S.Ct. 2117, 2121 (1988). There is, therefore, no constitutional impediment to a transferee court's application of the transferor state's law following a Section 1404(a) transfer by either a defendant or a plaintiff.

III. The Writ Of Certiorari In This Case Should Not Be Dismissed As Improvidently Granted

Amicus Pfizer suggests that the writ of certiorari in this case should be dismissed as improvidently granted because this case is "an inadequate and inappropriate vehicle from which to derive a rule governing plaintiff-

initiated transfers under § 1404(a)." This case is an inappropriate vehicle only if the questions to be decided are those posited by Pfizer. Pfizer asks this Court to decide whether, in ruling on a plaintiff-made motion to transfer under Section 1404(a), the potential transferor court should consider factors beyond those considered with respect to defendant-made motions, and, if so, what additional factors should be considered. Because the Respondent failed to oppose the Petitioners' motion to transfer, Pfizer claims that this case is an inappropriate one in which to resolve these issues.

The issue before this Court, however, is not whether the Mississippi District Court gave due consideration to all of the proper factors when it granted the Petitioners' motion for a change of venue. Rather, the issue with respect to which a writ of certiorari was sought and granted is what state's law must be applied after there has been a plaintiff-initiated transfer from a court having proper venue and jurisdiction (*see* page i, *supra*). Pfizer's arguments with respect to what additional considerations should govern when a plaintiff is seeking a transfer pursuant to Section 1404(a) are simply irrelevant to a determination of the question presented for review in this case.[2] The law to be applied following a transfer is an

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[2] Contrary to Pfizer's assertions, it is not the Petitioners' position that because they filed their lawsuit in a proper forum they were entitled as of right to a transfer. The Petitioners were required to convince the Mississippi District Court that the convenience of the parties and witnesses, and the interest of justice, warranted a transfer. They did so, however; and the Respondent did not seek review of the resulting transfer order. The propriety of the transfer order is not before this Court. After the transfer, the Petitioners had a right to the application of Mississippi law, as Pfizer appears to concede.

immutable matter which is not dependent upon the merit, or lack thereof, of a plaintiff's motion for a change of venue. Although the law to be applied following a transfer is unquestionably a factor which may be considered by the potential transferor court, *see Van Dusen v. Barrack*, 376 U.S. at 643, the law to be applied will not change depending upon the strength or weakness of the other factors being weighed in determining whether to allow the transfer. Therefore, the "fait accompli" status of the transfer in this case when the issue of the applicable law arose does not make this an inappropriate case in which to decide that issue. The correctness of the transfer decision has no bearing on the resolution of the issue presented for review.

Moreover, the question presented for review is an important one concerning the construction and operation of a federal statute. The resolution of the question of the applicable law following a plaintiff-initiated transfer will have a significant impact on the functioning and administration of the federal court system and will resolve a dispute among the circuit courts of appeal. The writ of certiorari in this case was not improvidently granted and should not now be dismissed. Rather, this Court should resolve the important question posed by this case and establish uniformity in the federal court system by determining that the transferor state's law must be applied following a plaintiff-initiated transfer from a court having proper venue and jurisdiction.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the prior Brief For Petitioners, the judgment of the United States Court of Appeals for the Third Circuit should be reversed.

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MOTION FILED
MAR 1 1990

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DEERE & COMPANY,

Respondent.

On Writ Of Certiorari To The United States Court of Appeals For The Third Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PFIZER INC. IN SUPPORT OF RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ALBERT J. FERENS and
MARGARET L. FERENS,

Petitioners,

v.

JOHN DEERE COMPANY, a/k/a
DEERE & COMPANY,

Respondent.

On Writ Of Certiorari To The United States Court of Appeals For The Third Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF PFIZER INC. IN SUPPORT OF RESPONDENT

Pursuant to Rule 36.3 of the Rules of this Court, amicus, Pfizer Inc., hereby moves for leave to file the attached brief *amicus curiae*. Petitioners have refused consent for amicus to file a brief *amicus curiae* in this case.

Amicus is a Delaware corporation with its principal place of business in New York. It is a manufacturer of diverse and widely distributed product lines, which include pharmaceutical drugs. Amicus sells its products nationwide, indeed worldwide, and has cases

pending in federal and state courts throughout the country. The realities of the current abuse and threat of abuse by many plaintiffs of the privilege of transfer made available by § 1404(a) is of particular concern to amicus and many other companies similarly situated. Amicus seeks to bring to the attention of the Court some considerations relevant to the Court's disposition of this case that may either not be present in this case or may not be fully developed by the parties because of the somewhat unusual posture in which this case presents the question upon which the Court granted certiorari.

Amicus therefore respectfully requests leave to file the attached brief *amicus curiae*.

August 1, 1989 Respectfully submitted,

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QUESTIONS PRESENTED

1. Whether the plaintiff-initiated transfer of a case under the federal transfer statute is subject to the same standards and considerations that are generally applicable to defendant-initiated transfers under that statute.

2. If plaintiff-initiated transfers under the federal transfer statute are subject to considerations beyond those applicable to defendant-initiated transfers because of the plaintiff's broad power to choose the initial forum, what additional considerations should be brought to bear in a district court's exercise of its broad discretion to grant or deny a plaintiff-initiated transfer motion?

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IN THE

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OCTOBER TERM, 1989

No. 88-1512

ALBERT J. FERENS and
MARGARET L. FERENS,

Petitioners,

v.

JOHN DEERE COMPANY, a/k/a
DEERE & COMPANY,

Respondent.

**On Writ Of Certiorari To The
United States Court of Appeals
For The Third Circuit**

BRIEF OF PFIZER INC. AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICUS CURIAE

Amicus is a Delaware corporation with its principal place of business in New York. It is a manufacturer of diverse and widely distributed product lines, which include pharmaceutical drugs. Amicus sells its products nationwide, indeed worldwide, and has cases pending in federal and state courts throughout the country. The realities of the current abuse and threat

of abuse by many plaintiffs of the privilege of transfer made available by § 1404(a) is of particular concern to amicus and many other companies similarly situated. Amicus seeks to bring to the attention of the Court some considerations relevant to the Court's disposition of this case that may either not be present in this case or may not be fully developed by the parties because of the somewhat unusual posture in which this case presents the question upon which the Court granted certiorari.

STATEMENT OF THE CASE

The facts material to the questions before the Court are not in dispute. Petitioner Albert J. Ferens, a resident of Pennsylvania, purchased a combine manufactured by respondent from a dealer in Pennsylvania in July 1981. So far as the record in this case discloses, the combine was neither designed nor manufactured in Mississippi. Nor have petitioners, so far as the record discloses, ever even been in the State of Mississippi. In July 1982, Mr. Ferens was injured while cleaning the combine in Pennsylvania.

Respondent is a Delaware corporation with its principal place of business in Illinois. The only contact between Mississippi and respondent disclosed by the record is that respondent has appointed a local registered agent in Mississippi authorized to accept service of process on its behalf.

As petitioners themselves were later to allege in their transfer motion, their claims against respondent had absolutely no connection whatsoever with Mississippi. Notwithstanding that, petitioners filed this action in the Southern District of Mississippi seeking damages identical to those they were already seeking

on a different legal theory in an action brought in the Western District of Pennsylvania. As the Court of Appeals stated, and as petitioners concede, petitioners brought their parallel action in the Southern District of Mississippi solely because, by doing so, they expected to gain the benefit of Mississippi's six-year statute of limitations.

Prior to and after the filing of this action in Mississippi, petitioners were fully aware of, and indeed alleged in their motion to transfer this case from Mississippi to Pennsylvania, that: (1) their claims had no connection with Mississippi; (2) no material witnesses were in Mississippi; (3) no relevant documents were in Mississippi; and (4) the action they had already filed in the Western District of Pennsylvania presented common questions of fact and law. *Ferens v. Deere & Co.*, 862 F.2d 31, 32-33 (3d Cir. 1988).

The pertinent distillation of these facts yields but a single conclusion: petitioners filed this action in Mississippi under the belief and the actuality that it was being filed in a paradigmatic inconvenient forum. The questions presented by this case are whether a transfer motion filed by a plaintiff, already possessed of the broad power to select a convenient or totally inconvenient forum in which to file suit, is to be evaluated by the transferor court on the basis of considerations beyond those that govern defendant-initiated transfers and, if so, what those additional considerations are.

SUMMARY OF ARGUMENT

The doctrine of *forum non conveniens* and the statute which codified that doctrine in the federal system, 28 U.S.C. § 1404(a), serve the purpose of promoting

efficiency in the conduct of litigation while ensuring that justice is done to both plaintiffs and defendants in the process of achieving efficiency. The need for such a transfer device arises out of the basic structure of our litigation system under which plaintiffs start lawsuits, and have wide latitude to select from among various possible forums in bringing a law suit. The transfer device is designed, in part, to temper this initial and substantial power of plaintiffs to select a forum by ensuring that a plaintiff, once having selected its preferred forum, may not then unilaterally and successfully demand that the defendant be required to defend against that claim in yet another forum over the latter's objection.

In enacting § 1404(a), Congress did not expressly consider the implications of that statute with respect to choice of law issues generated by the inevitable contest between plaintiffs and defendants to secure the benefit of the law more favorable to their respective causes. In the forty years since § 1404(a) was enacted, the lower federal courts have become enmeshed in a largely futile and unending effort to rationalize and apply unenacted choice of law principles to complex circumstances in which doing justice to the litigants, even rough justice, is not a straightforward task. Defendants may be expected to attempt to utilize the transfer statute to defeat or chip away at the natural advantage plaintiffs enjoy in selecting the forum. This Court made clear in *Van Dusen* v. *Barrack*, 376 U.S. 612 (1964), that § 1404(a) may generally not be used by defendants in such a fashion.

The utilization of § 1404(a) by plaintiffs, however, presents a potential for abuse because if a plaintiff first chooses a forum, including an inconvenient one,

and then successfully invokes § 1404(a), the plaintiff will have succeeded in choosing not only the initial forum but thereafter a second forum that, absent changed circumstances following its initial selection, the plaintiff presumptively viewed as the most convenient forum in which to litigate the case in the first instance. Thus, a plaintiff-initiated transfer necessarily raises the question whether § 1404(a) should be interpreted to enhance the already superior position of the plaintiff as regards forum selection.

Several federal district courts that have confronted this issue as transferor courts *prior to transfer* have concluded that, as a general matter, a plaintiff must—absent the cooperation of the defendant—abide its initial choice of the forum. These courts have, at the same time, recognized that circumstances arising subsequently to a plaintiff's initial choice of a forum may justify a plaintiff's seeking to avail itself of § 1404(a). Amicus believes that this common sense solution, which recognizes the fundamental distinctions between plaintiff-initiated and defendant-initiated transfers, should be adopted by the Court in an appropriate case.

Amicus also respectfully suggests that the case at bar is not an appropriate vehicle for this Court's consideration of this important question. Respondent did not oppose petitioners' transfer motion in the transferor court. Petitioners, for their part, do not contend that respondent waived its rights under § 1404(a) by its failure to assert these rights in the Southern District of Mississippi. The result is that the case before the Court involves an abstract and relatively minor controversy over the choice of law implications of a plaintiff-initiated transfer that should be, in the view

of amicus, of only marginal concern to the Court in construing § 1404(a) in the context of plaintiff-initiated transfers.

ARGUMENT

I

INTRODUCTION

The *forum non conveniens* doctrine, as implemented by the federal transfer statute, 28 U.S.C. § 1404(a), vests broad discretion in a district court to transfer—or refuse to transfer—a case to another district based upon "considerations of convenience and justice." *Van Dusen* v. *Barrack*, 376 U.S. 612, 616 (1964). It is, at the very least, counterintuitive that a plaintiff, having deliberately chosen to bring its action in a manifestly inconvenient forum (or even a convenient forum), could—absent the consent of the defendant[1]—avail itself of this essentially equitable doctrine and demand that the inconvenience already imposed on the defendant by virtue of the plaintiff's deliberate initial choice of an inconvenient forum be disregarded and the action transferred to another forum to suit the plaintiff's desires.

[1] The questions presented by this case arise in a somewhat unusual posture because, as petitioners correctly point out, Br. of Petrs., at 5, respondent did not oppose their transfer motion in the Southern District of Mississippi. Nor did respondent request the Southern District of Mississippi to qualify or condition a transfer on, among other possibilities, petitioners' acceptance of Pennsylvania's two-year statute of limitations. Instead, respondent waited until the transfer was an accomplished fact to assert a right, necessarily arising under § 1404(a) for present purposes, to application of Pennsylvania's two-year statute of limitations. The parties have not directly addressed the question whether respondent should have asserted in the Southern District of Mississippi the right under § 1404(a) that it later asserted in the Western District of Pennsylvania after transfer. *Cf. Hoffman* v. *Blaski*, 363 U.S. 335, 345-50 (1960) (Frankfurter, J., dissenting). It would appear to amicus that even if respondent should have done so, petitioners have themselves waived their right to complain because they apparently did not present a "waiver" argument in opposition to respondent's motion to dismiss the complaint on statute of limitations grounds in the Western District of Pennsylvania or in the Third Circuit. Amicus does submit, however, that the important question on which the Court granted certiorari should be decided from the perspective of what considerations should illuminate the decision of a "transferor" court confronted with a transfer motion, not from the perspective of a transferee district court in which the transfer is treated by the parties as a *fait accompli*. *See also* notes 3 & 7, *infra*.

If the only criterion for transfer established by § 1404(a) were that of "convenience" to the parties and witnesses *after a transfer has occurred*, such a time-bound view of the concept of convenience would weigh in favor of the grant of a transfer motion on *the facts of this case*.[2] There is, however, more to the proper application of § 1404(a) to plaintiff-initiated transfers than simply whether the Western District of Pennsylvania was, at least after the transfer, regarded by petitioners and respondent as a more convenient forum.

[2] As discussed in note 5 *infra*, respondent in this case, having already been required to hire counsel to protect its interests in this case in the Southern District of Mississippi, was not likely to object to transfer of this case to a district in which most of the potential witnesses were located and in which respondent had already undergone the burden of obtaining counsel to defend it in the parallel action brought earlier in the Western District of Pennsylvania by petitioners.

It will, generally speaking, be presumptively inconvenient for any defendant to be haled into a district court that has no connection with the case and which is located in a distant State in which the defendant has no substantial physical presence. Thus, it was undoubtedly inconvenient for respondent to have to retain Mississippi counsel and to respond to petitioners' complaint in the Southern District of Mississippi.

That initial inconvenience faced by respondent and similarly situated defendants is built into our legal system. As Justice Jackson observed:

> It is often said that the plaintiff may not, by choice of an inconvenient forum, "vex," "harass," or "oppress" the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.

Gulf Oil Corp. v. *Gilbert*, 330 U.S. 501, 508 (1947) (footnote omitted). It is difficult, however, to believe that Justice Jackson and the Court for which he wrote in *Gilbert* would not be startled at the prospect of a plaintiff's attempting, on the facts of the case at bar, to avail itself of a doctrine conceived, and a federal transfer statute enacted, for the purpose of curbing the power of plaintiffs to "vex," "harass" or "oppress" defendants. Had respondent objected to the transfer in the Southern District of Mississippi, its objections would likely have been accorded considerable weight.[5]

[5] Respondent's view of "convenience" was, of course, appar-

The initial inconvenience to a defendant in having to attend to a complaint and other initiatives by a plaintiff such as occurred in this case in the Southern District of Mississippi is a factor to be weighed heavily in applying § 1404(a) to a plaintiff-initiated transfer. But "convenience" is not the sole statutory criterion by which a district court is to decide whether, and under what conditions, a motion to transfer under § 1404(a) shall (or shall not) be granted. As emphasized in *Van Dusen*, § 1404(a) requires that the broad discretion vested in a "transferor" court be exercised to achieve both convenience "and justice." Under the language of § 1404(a), the question is whether considerations of both "convenience" *and* "justice" should have provided petitioners an unqualified right to the convenience of a Pennsylvania forum in a situation in which they deliberately chose to bring the action initially in a forum that was "convenient" only in the sense that by bringing the action in Mississippi, they hoped to capture Mississippi's more favorable statute of limitations and then take that prize back home to Pennsylvania. As amicus shall now demonstrate, construing § 1404(a) to authorize plaintiffs to enhance their existing power to select the initial forum would

ently colored by its expectation that the transfer of the case might result in application of Pennsylvania's two-year statute of limitations and, as occurred, dismissal of the action altogether as barred by that limitations statute. As amicus discusses at the outset of part II.B. below, however, petitioners (and, to some extent, respondent) have framed the question in this case as involving the appropriate law to apply after transfer rather than as whether petitioners had an unqualified right to the transfer in the first instance. This aspect of the case renders it an extremely awkward vehicle by which to decide how § 1404(a) should be applied to plaintiff-initiated transfers. *See* note 1, *supra*, and note 9, *infra*.

be inconsistent with the concept of justice embodied in § 1404(a).

II

THE FEDERAL TRANSFER STATUTE DOES NOT ENTITLE A PLAINTIFF WHO DELIBERATELY FILES AN ACTION IN AN INCONVENIENT FORUM TO AN UNCONDITIONAL TRANSFER OF ITS CASE TO ANOTHER FORUM

A. Plaintiff-initiated Transfers Under § 1404(a) Implicate Concerns of Convenience and Justice That Are Not Present in Defendant-initiated Transfers

It is common ground that the Court, in *Van Dusen* v. *Barrack*, did not decide

> whether in all cases § 1404(a) would require the application of the law of the transferor, as opposed to the transferee, State. We do not attempt to determine whether, for example, the same considerations would govern if a plaintiff sought transfer under § 1404(a) . . . .

376 U.S., at 640 (footnote omitted). That the *Van Dusen* Court expressly recognized that a plaintiff-initiated transfer motion might well involve different considerations than a transfer initiated by a defendant is not surprising. First, because of the "necessary generality" of the federal venue statutes, *Gulf Oil Corp.* v. *Gilbert*, 330 U.S., at 507, the Court was certainly aware that, in initially selecting a federal district in which to bring its action, a plaintiff enjoys a broad power to engage in "forum shopping." Justice Frankfurter put this point in a way that captures the essence of the issue under review in this case, stating that § 1404(a)

> operates to temper only to a slight degree the enormous "discrimination" inherent in our system of litigation whereby the sole choice of forum, from among those where service is possible and venue unobjectionable, is placed with the plaintiff. The plaintiff may choose from among these forums at will; under § 1404(a) the defendant must satisfy a very substantial burden of demonstrating where "justice" and "convenience" lie, in order to have his objection . . . respected.

Sullivan v. *Behimer*, 363 U.S. 335, 365-66 (1960) (Frankfurter, J., dissenting).

Whether § 1404(a) should be interpreted to enhance, rather than temper—even to just a "slight degree,"—the enormous existing power of a plaintiff to choose the initial forum by providing the plaintiff with an unqualified right to select *two successive forums* was quite likely a question that would not have occurred to the Court in the context of a case in which the defendant was attempting "to defeat the state-law advantages that might accrue [to the plaintiff] from the exercise of [its] venue privilege . . . ." *Van Dusen* v. *Barrack*, 376 U.S., at 635.

Second, in his brief in *Van Dusen* the Solicitor General had pointed out that prior to the enactment of § 1404(a), it was not unusual for a court to order dismissal of an action on *forum non conveniens* grounds only if the defendant seeking that dismissal would agree to submit himself voluntarily to the jurisdiction of the more convenient forum. This condition was attached in the context of cases in which "the plaintiff was forced originally to bring his suit

in an inconvenient forum by his inability to serve defendant elsewhere . . . ." Br. for United States *et al.*, at 14 n.19 (filed in Case No. 80, Oct. Term 1963). Thus, the *Van Dusen* Court was acutely aware that the application of the *forum non conveniens* doctrine (and, therefore, § 1404(a)) could well depend on a variety of factors, including whether the plaintiff had been initially "forced" into a forum because of factors beyond the plaintiff's control.[4]

Third, in expressly noting the distinction between plaintiff-initiated and defendant-initiated transfers under § 1404(a), the *Van Dusen* Court analogized to cases decided under 28 U.S.C. § 1406(a)[5] in which a plaintiff, having brought a case in a district in which venue was improper, sought transfer of the case to another district court and claimed that the transfer would meet the requirements of § 1406(a) that it be "in the interest of justice." *Van Dusen* v. *Barrack*, 376 U.S., at 640 n.42 (referencing *id.*, at 634 n.29). One of the cases discussed by the *Van Dusen* Court on this point involved a plaintiff who had filed an action in one district in which venue was improper and who then sought a transfer to another district and to take the first district's statute of limitations

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[4] It does not appear that the record in this case establishes what, if anything, may have prevented petitioners from bringing their action in Pennsylvania prior to the running of Pennsylvania's two-year statute of limitations.

[5] Under 28 U.S.C. § 1406(a),

> The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

with him. *Viaggio* v. *Field*, 177 F. Supp. 643 (D. Md. 1959). The *Viaggio* court held that a transfer under such circumstances would not be "in the interests of justice," *id.*, at 647-48, and equated an attempt by a plaintiff to take advantage of that transfer statute in that fashion with a defendant's trying to gain an advantage by invoking § 1404(a). At a minimum, the *Van Dusen* Court's citation and quotation of *Viaggio* with apparent approval establishes that that Court recognized the potential that plaintiffs, as well as defendants, could abuse the right to transfer cases under both § 1404(a) and § 1406(a) and that such abuses were subject to judicial control under the requirement that transfers under either statute must be in the interest of justice.[6]

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[6] As the *Van Dusen* Court indicated, the provisions of § 1406(a) are "analogous" to § 1404(a), those provisions "share the same statutory context," and they contain similar language in several respects. 376 U.S., at 621 n.11. Thus, the two provisions "may be compared" in interpreting the meaning of phraseology common to both. *Id.*, at 634. These observations cast considerable doubt on the reasoning of cases such as *Martin* v. *Stokes*, 623 F.2d 469 (6th Cir. 1980), in which courts have concluded that in cases transferred pursuant to § 1406(a), the law of the transferee jurisdiction will always apply, while transfers under § 1404(a) will always result in application of the law of the transferor jurisdiction. Such cases do not appear to admit the broad discretion granted by both statutes to a transferor district court, taking a potentially large number of diverse factors into account in making the transfer decision and attaching conditions to a transfer order (directly or by stipulation of the parties) that will advance the interests of convenience and justice. Such cases also fail to address the fundamental issue whether there are valid distinctions between defendant-initiated and plaintiff-initiated transfers under § 1404(a) that should be taken into consideration in the transferor court's exercise of its broad discretion.

B. Considerations Drawn from the Policies Animating the Doctrine of *Forum Non Conveniens* as Implemented by § 1404(a) Militate Decisively Against the Unconditional Right in Plaintiffs to Transfer of an Action Knowingly and Deliberately Brought in an Inconvenient Forum

Petitioners' position on the merits is quite clear: because they brought this action in a proper venue in which they could validly obtain jurisdiction over respondent—the Southern District of Mississippi—they were entitled as of right to a transfer of the case to a forum more convenient than the one they initially chose and to have Mississippi's statute of limitations applied in the transferee forum. Amicus submits that petitioners' assertion of an unqualified "right" to application of Mississippi's statute of limitations after transfer is a red herring. Under the strictest interpretation of *Van Dusen*, it would appear that if petitioners had an unqualified right under § 1404(a) to transfer of this case to the Western District of Pennsylvania, then that court was obliged to apply Mississippi's statute of limitations. The question in this case, however, is whether § 1404(a) granted petitioners such an unqualified right to transfer in the first instance.[7]

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[7] Not surprisingly, petitioners devote virtually the entirety of their brief to this red herring. Correspondingly, their brief—which contains only occasional references to the language of § 1404(a)—does not even discuss how the concept of convenience might be implicated in the "right" of a plaintiff to transfer its action from an inconvenient forum the plaintiff chose, or what the words of the statute, "in the interest of justice," might mean with respect to plaintiff-initiated transfers. Petitioners have, for self-serving reasons, simply asked the wrong question.

Amicus believes that the potentially different considerations involved in plaintiff-initiated transfer motions may generally be analyzed under two headings. First, what is the nature of the burden that a plaintiff invoking § 1404(a) must meet in order to establish its entitlement to an unqualified transfer of its action to another forum? Second, what additional considerations should govern the application of § 1404(a) when a plaintiff, rather than a defendant, invokes that statute? Amicus will address each of these related considerations in turn.

1. The Burden of Persuasion

As Justice Jackson observed in *Gulf Oil Corp.* v. *Gilbert*, 330 U.S., at 508, "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." This observation, although made just prior to the enactment of § 1404(a) in 1948, has been routinely applied by the lower federal courts in deciding defendant-initiated transfer motions. *See, e.g., Magnavox Co.* v. *Bally Manufacturing Co.*, 414 F. Supp. 891, 892 (D. Ill. 1976) (quoting and adopting *Gulf Oil Corp.* v. *Gilbert*, *supra*, on this point).

The substantial burden on defendants seeking a transfer under § 1404(a) is, however, a two-edged sword, as has also been recognized by the lower federal courts. Thus, "[i]t is generally held that a transfer under § 1404(a) is not available to a plaintiff who has voluntarily chosen his own forum .... [In] the absence of a clear showing ...., plaintiff will be held to the forum which he has selected." *Anschell* v. *Sackheim*, 145 F. Supp. 447, 452 (D.N.J. 1956).[8] As dis-

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[8] In one of the first cases interpreting § 1404(a), a district

cussed above, § 1404(a) was enacted to "temper" the ability of a plaintiff to engage in "discrimination" against a defendant through the ability to choose among a number of available convenient or inconvenient venues in which to file its action initially. *Sullivan* v. *Behimer*, 363 U.S.; at 365-66 (Frankfurter, J., dissenting). Hence, the burden on a plaintiff to justify a transfer of its action should be, as a matter of common sense, greater than the burden imposed upon a defendant.

2. A Plaintiff Should Be Required To Show Substantial Changed Circumstances in Order To Establish an Unqualified Right to a Transfer under § 1404(a)

To avoid the kind of "double" discrimination that is inherent in a plaintiff's invocation of § 1404(a), the federal district courts—who are closest to the give-and-take of litigation and to the tactics of plaintiffs and defendants in attempting to secure every possible advantage—have, with relative uniformity, concluded that a plaintiff, in order to invoke § 1404(a) successfully, must be able to establish the occurrence of an event subsequently to the filing of its action that justifies the inconvenience inherent in the transfer of a case after proceedings have begun. As Judge Lasker has put this principle: "When a plaintiff is a movant under 1404(a) he must show a change in circumstances since the filing of suit." *Harry Rich Corp.* v. *Curtiss-Wright Corp.*, 308 F. Supp. 1114, 1118 (S.D.N.Y. 1969). *Accord*, *James* v. *Daley and Lewis*, 406 F. Supp. 645, 648 (D. Del. 1976); *Roberts Brothers, Inc.* v. *Kurta Brothers*, 231 F. Supp. 163, 167 (D.N.J. 1964).

court took the position that § 1404(a) "is not available to plaintiffs who voluntarily choose their own forum." *Barnhart* v. *John B. Rogers Producing Co.*, 86 F. Supp. 595, 599 (N.D. Ohio 1949). Although that position would not seem to be required by the language of § 1404(a), which does not prohibit invocation of § 1404(a) by plaintiffs, it nevertheless reflects the common sense view that a plaintiff, having chosen its forum, should not be able to hale the defendant into yet another court over the defendant's objection absent compelling reasons.

Such a bright-line rule is fully consonant with and arises out of § 1404(a)'s requirement that transfers must promote both convenience and justice. As for convenience, the rule would recognize that the defendant—not the plaintiff—should generally hold the keys to a transfer where the defendant has already been haled into a manifestly inconvenient forum, has hired one set of counsel to represent him in that forum, and is now faced with the further inconvenience and expense of repeating that exercise and incurring additional expense in a different forum.[9]

[9] In most, if not the overwhelming majority, of cases in which the transfer issue arises, there will not be—as in the case at the bar—a pending parallel action in the proposed transferee district, the pendency of which would tend to ameliorate the burden and expense on the defendant to obtain new counsel licensed and otherwise capable of representing the defendant in the proposed transferee court. The fortuitous circumstance of this case that an earlier, parallel action had been filed by petitioners should not, however, dictate this Court's resolution of the broader question reserved by the Court in *Van Dusen*. Once a defendant in the more typical case has undergone the initial inconvenience of defending itself in a forum having no connection with the case itself, that defendant's views on the propriety of a transfer should be accorded special deference by the transferor court. This is perhaps but another way of saying that a plaintiff, having inconvenienced the defendant once, bears a heavy burden to justify a transfer over the defendant's objection.

As for serving the interests of justice, the interpretation of § 1404(a) proposed by amicus would, to a "slight degree," constrain the ability of a plaintiff to select an initial forum, be it convenient or, as in this case, manifestly and deliberately inconvenient, and then to transfer the case to another forum believed by the plaintiff to be more convenient for the conduct of what remains of the case. The defendant, for a wide variety of reasons, may be prepared to agree to such a transfer in an arrangement that resolves any conflict of law issue that may arise. Amicus believes, however, that in the absence of such an agreement, the defendant should have the power to keep the litigation in the forum initially selected by the plaintiff, absent intervening circumstances. In short, a plaintiff who has knowingly and deliberately chosen a particular forum will have to abide that decision unless subsequent events *beyond its control* persuade the transferor court that justice to the plaintiff *and* the defendant requires the initial venue choice of the former be revisited and that justice to *all* the litigants would be promoted by a transfer.

The standard proposed by amicus would not introduce inflexibility into a system that is also designed to address issues such as inconvenience to witnesses. A plaintiff who brings an action in a manifestly inconvenient forum from the standpoint of the location of probable witnesses does so with the full awareness that witnesses it may want to call may be subject to a deposition subpoena but not to a trial subpoena. *Compare* Fed. R. Civ. P. 45(d) *with* Fed. R. Civ. P. 45(e). There is surely nothing "unjust" about a result in which the plaintiff, having chosen a forum in which to litigate, is thereafter faced with having to put on parts of its case through depositions rather than live testimony because material witnesses not subject to a trial subpoena decline to appear voluntarily in a district court. Indeed, in that situation the defendant could well be in the same position and could, if it chose, invoke § 1404(a) or agree with plaintiff to a transfer.

Furthermore, and as the Court recognized in *Van Dusen*, courts dealing with defendants' motions to transfer "have relied at least in part upon a transfer-on-condition or estoppel approach to grant transfer and protect the plaintiff." 376 U.S., at 631 n.27. This *flexible* tool would be equally available *to protect the defendant* in cases involving plaintiff-initiated transfers.[10]

Finally, the bright-line approach advocated by amicus would minimize the impact of choice-of-law considerations in the application of § 1404(a), considerations that have generated a wide variety of sometimes inconsistent approaches[11] to the application of § 1404(a). Such minimization is especially called for given the complexity of choice-of-law rules in federal diversity cases and the fact that in enacting § 1404(a), neither Congress nor the Advisory Committee re-

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[10] Had respondent objected to the transfer of this case, the test proposed by amicus would seemingly have required the Southern District of Mississippi to deny petitioners' § 1404(a) motion because nothing appears, on this record, to have occurred subsequently to the filing of this action that would constitute changed circumstances.

[11] *See* Note, *Choice of Law After Transfer of Venue*, 75 Yale L.J. 90, 91-92 & nn.12-16 (1965).

sponsible for that provision even focused on the choice-of-law issues raised by § 1404(a).[10]

III

THE PETITION SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED

It is respectfully submitted that the peculiar facts of this case, including the parallel Pennsylvania action, respondent's failure to oppose petitioners' transfer motion, and petitioners' failure to present a "waiver" argument in response thereto, render this case an inadequate and inappropriate vehicle from which to derive a rule governing plaintiff-initiated transfers under § 1404(a). Accordingly, amicus respectfully suggests that the Court dismiss the petition as improvidently granted.

CONCLUSION

Litigants may be expected to take every reasonable action and pursue every course legitimately open to them under the statutes and rules governing litigation to secure an advantage over their opponents. The playing field upon which the transfer "game" is played is not level at any time during that game. Plaintiffs in search of law, courts or juries perceived to be friendly to their cause have wide latitude to pick their forums. Section 1404(a), both by its language, intent and derivation, accepts that "discriminatory" tilt but tempers it with fundamental notions of convenience and fairness. Section 1404(a) does not, as petitioners argue to the Court, authorize an increase in the existing disparity between plaintiffs and defendants by

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[10] *Id.*, at 94.

permitting plaintiffs an unqualified second bite at the forum-shopping apple.

August 1, 1989

Respectfully submitted,

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MOTION FILED
AUG 2 1988

(1)

No. 88-512

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ALBERT J. FERENS and
MARGARET L. FERENS, his wife,

Petitioners,

vs.

JOHN DEERE COMPANY, a/k/a
DEERE & COMPANY,

Respondent.

On Writ Of Certiorari To The United States
Court Of Appeals For The Third Circuit

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF AMICUS CURIAE PRODUCT LIABILITY ADVISORY COUNCIL IN SUPPORT OF RESPONDENT

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No. 88-1512

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ALBERT J. FERENS and
MARGARET L. FERENS, his wife,

Petitioners,

vs.

JOHN DEERE COMPANY, a/k/a
DEERE & COMPANY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE PRODUCT LIABILITY ADVISORY COUNCIL IN SUPPORT OF RESPONDENT

Pursuant to Rule 36 of the Rules of the Supreme Court of the United States, the Product Liability Advisory Council ("PLAC") hereby moves this Court for leave to file the enclosed brief as amicus curiae in support of the Respondent herein. As grounds for this motion, Amicus Curiae states as follows:

1) PLAC is a non-profit member corporation whose principal purpose is to submit briefs, as friend of the

court, in cases involving significant issues affecting the law of product liability.

2) PLAC represents a broad cross-section of product manufacturers, and the PLAC membership roster is attached to this motion and brief as Exhibit A.

3) Most, if not all, members of PLAC do business in Mississippi and thus have a direct and vital interest in the limitations issue involved in this case.

4) Most, if not all, members of PLAC are subject to personal jurisdiction and venue in more than one state and thus have a direct and vital interest in the procedural and conflict of law issues raised by Petitioners' use of 28 U.S.C. Section 1404(a) in this case.

5) Amicus Curiae believes that the practical effect and consequences of the holding in this case, beyond the limitations question to other procedural and conflict of law issues, has not been fully explored in the briefs that have been or will be filed.

6) That counsel for Respondent has consented to the filing of this Amicus Curiae Brief, but counsel for Petitioners has refused to consent, thus necessitating this motion.

DATED: August 2, 1989.

Respectfully submitted,

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No. 88-1512

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Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF AMICUS CURIAE PRODUCT LIABILITY ADVISORY COUNCIL IN SUPPORT OF RESPONDENT

STATEMENT OF INTEREST OF AMICUS CURIAE

The Product Liability Advisory Council ("PLAC") is a non-profit, broad-based group of product manufacturers and distributors. Its principal purpose is to submit briefs, as friend of the court, in cases involving significant issues affecting the law of product liability. Most, if not all,

members of PLAC do business in Mississippi and thus have a direct and vital interest in the limitations issue involved in this case. Likewise, most, if not all, members of PLAC are subject to personal jurisdiction and venue in more than one state and thus have a direct and vital interest in the procedural and conflict of law issues raised by Petitioners' use of 28 U.S.C. Section 1404(a) in this case.

SUMMARY OF ARGUMENT

The Court of Appeal's holding—that the limitations law of the transferee forum governed the instant plaintiff-initiated transfer under 28 U.S.C. Section 1404(a)—is consistent with this Court's holding in *Van Dusen v. Barrack*, 376 U.S. 612 (1964), that Section 1404(a) should not be used as a forum shopping device or as a means to escape the *Erie* doctrine. Petitioners' machinations to engraft an unrelated state's statute of limitations to a case long since barred under the law of their home state and the convenient forum go far beyond forum shopping and, if allowed, would permit plaintiffs to make similar use of Section 1404(a) to obtain all kinds of procedural law advantages and even different substantive law through another state's conflict of law rules. The ultimate result would be that cases that otherwise would have been filed in state court will be filed in the already overcrowded federal court system anytime that plaintiff can find a state where the defendant is subject to personal jurisdiction and where some advantage, not available in the convenient forum, can be obtained.

ARGUMENT

I.

PETITIONERS' ATTEMPTED USE OF SECTION 1404(a) TO TRY THIS PENNSYLVANIA CASE IN PENNSYLVANIA UNDER MISSISSIPPI LIMITATIONS LAW EXTENDS "FORUM SHOPPING" INTO A "GRAFTING" PROCEDURE WHOLLY AT ODDS WITH THIS COURT'S RATIONALE IN *VAN DUSEN*.

Petitioners urge that this case does not involve impermissible "forum shopping" (Petitioners' Br. 22-23). In a literal sense, Petitioners are correct. Petitioners' chosen forum for this action is Pennsylvania, and through their Section 1404(a) motion they have elected to try the case in Pennsylvania. What Petitioners actually have "shopped for" is not another forum, but a piece of limitations law from a totally disinterested state, which law they have then attempted to "engraft" into their tort action so that it remains even after the case is transferred back to their chosen forum, Pennsylvania, where the statute of limitations has long since run.

Petitioners candidly state in their Motion for Change of Venue under Section 1404(a):

> Plaintiffs' claim does not arise out of or have any connection with any acts by the Plaintiffs or Defendant or facts or circumstances arising in this State and this District. (Joint Appendix., p. 26)

Thus, by their own assertion, Petitioners filed this suit in the District Court for the Southern District of Mississippi, even though Mississippi had absolutely "no connection" with the case—for the sole purpose of reviving their tort cause of action that was barred by the statute of limitations in the forum (Pennsylvania) where it arose.

where it belonged, and where they already had pending in the federal court an action for breach of warranty involving the same facts and parties. But Petitioners had no desire or intention to try the case in Mississippi. Rather, through their Section 1406(a) motion they had the tort case transferred back to the Pennsylvania federal court hoping that the engrafted Mississippi limitations law would keep the resurrected tort case alive, though in Pennsylvania it had been dead for years.

Faced with these maneuvers, the Court of Appeals for the Third Circuit sensibly held that such limitations "shopping," would literally impose on every multi-state defendant a federal statute of limitations equal to the longest statutory limitation period among those states where it was subject to personal jurisdiction. The Court of Appeals correctly concluded that such a result was not consistent with the purpose or the intent of Section 1406(a) and did not come within the rationale for applying the transferor forum's law set forth by this Court in *Van Dusen v. Barrack*, 376 U.S. 612 (1964), for defendant-initiated transfers. In the language of the Court of Appeals, *Ferens v. Deere & Co.*, 862 F.2d 31, 36 (3d Cir. 1988), compelling application of the transferor forum's law to plaintiff-initiated transfers "would be contrary to the principles set forth in *Van Dusen*," 376 U.S. at 626, wherein this Court indicated that Section 1404(a) was not to be given any interpretation that allowed it to be used as a "forum shopping instrument" or as a means to avoid the holding in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

Van Dusen found good reason to allow the transferor forum's procedural laws and rules to govern a case where the defendant initiates the transfer. Defendants should not be able to use Section 1404(a) to change the law—substantive or procedural—controlling a case (*Van Dusen*, 376 U.S. at 639). But plaintiffs should not be able to do so either. The very same *Van Dusen* rationale, compelling application of the transferor forum's law to defendant-initiated transfers, should result in application of the transferee forum's law in this case and other plaintiff-initiated transfers.

II.

THE INTERPRETATION OF SECTION 1406(a) URGED BY PETITIONERS IS NOT RESTRICTED TO LIMITATIONS CASES.

This case involves a plaintiff's attempted use of Section 1406(a) to engraft an unrelated state's favorable statute of limitations to his action. But if this use of Section 1406(a) is proper and the transferor forum's procedural law governs even where plaintiff initiates the transfer, this tactic will not be restricted to statute of limitations cases. Instead, if Petitioners are right, all plaintiffs in diversity cases will be able to search out procedural advantages in any state in which a defendant is subject to personal jurisdiction, file suit there, and then have the case transferred back to the convenient forum with all the procedural advantages of the initial filing attached to it. Burden of proof, capacity to sue, evidentiary privileges, competency of witnesses, necessary parties, service of process, security for costs, set-offs, right to jury, and sufficiency of the evidence are just a few of the normally "procedural" matters that would be subject to this same Section 1406(a) strategy. See Restatement (Second) of Conflict of Laws, Sections 122-144 (1971).

Nor would such a use of Section 1406(a) be limited to only procedural advantages. Under *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), the applicable conflict of law rules in a diversity case are the conflict of law rules of the forum state. Thus, a plaintiff in the ap-

propriate conflicts case could use Section 1404(a) to change the substantive law applicable to the claim, and still try the case in its most appropriate and convenient forum.

To illustrate, assume hypothetically the same facts as in the instant case except that plaintiffs' farm straddled the Pennsylvania-Ohio border and that the accident actually occurred in Ohio. Assume further that the Ohio substantive law gave plaintiffs substantial law advantages in the amount of damages recoverable and the legal theories available. Assume further that Pennsylvania conflict of law rules have rejected the "lex loci delicti" rule in favor of the most significant contacts rule and therefore a district court in Pennsylvania would apply Pennsylvania substantive law. Nevertheless, if Petitioners' contentions here were valid, plaintiffs could avoid Pennsylvania substantive law simply by filing suit in the federal district court of some other state whose conflict of law rules still adhere to the "lex loci delicti" rule and where John Deere does business, thereby compelling application of Ohio substantive law. Having successfully shopped for and engrafted Ohio substantive law to their action, plaintiffs could then transfer the case back to Pennsylvania for trial under the favorable Ohio law!

III.

IF THE TRANSFEROR FORUM'S LAW IS APPLIED TO PLAINTIFF-INITIATED TRANSFERS, FEDERAL COURTS WILL BECOME A HAVEN FOR EVERY CASE IN WHICH A PLAINTIFF CAN USE SECTION 1404(a) TO OBTAIN A SIMILAR PROCEDURAL OR SUBSTANTIVE LAW ADVANTAGE.

If Petitioners' view of Section 1404(a) were upheld, then any competent plaintiff's lawyer could and should file suit in federal court anytime that diversity of citizenship exists and there is also any procedural or choice of law advantage in a state in which a given defendant is subject to jurisdiction, regardless of that state's lack of nexus or connection to the particular cause of action involved. Then, having filed suit in the federal district court of the state giving plaintiff such an advantage, counsel can then use Section 1404(a) to transfer the case back to its most convenient and proper forum—thereby burdening and expending the resources of two federal courts.

Thus, it is no exaggeration to expect that the already overloaded federal court calendars will be burdened with multiple suits filed in federal court solely to come within a statute of limitations here, or to pick off a favorable procedural rule there, or to capture a wholly different substantive law theory through the use of different conflict of law rules in still another jurisdiction, after which the case can then be transferred back to the federal court sitting in the convenient state where plaintiff always desired and intended to try it.[5]

In this computerized age, it is no flight of fancy to foresee that with the assistance of a computer and appropriate data bases, plaintiffs will need only an instant to determine exactly what state will give them the best advantages to engraft onto their action before bringing the case back to its home state under Section 1404(a).

Again, such results cannot have been intended either by Congress when it enacted Section 1404(a) or by this Court when it decided *Van Dusen*.

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[5] The overcrowded federal docket has been repeatedly recognized by this Court. *See, e.g., Burlington N.R.R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 464 (1987); *United States v. Mendoza*, 464 U.S. 154, 161 (1984); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 127 (1979) (Rehnquist, J., dissenting).

CONCLUSION

In *Van Dusen*, this Court astutely cautioned that there might be different considerations that would mandate that the transferor forum law rule not be applied to plaintiff-initiated Section 1404(a) transfers, *Van Dusen v. Barrack*, 376 U.S. 612, 640 (1964). As set forth above and in Respondent's Brief, there are numerous considerations which should prevent the law of the transferor forum from being applied in plaintiff-initiated transfers, and indeed the *Van Dusen* goals of eliminating forum shopping and staying within the parameters of the *Erie* doctrine will be fulfilled only if this Court concurs with the Court of Appeals that the transferee forum's law applies in plaintiff-initiated transfers.

Accordingly, this Amicus Curiae respectfully urges that this Court affirm the judgment of the Court of Appeals for the Third Circuit.

Respectfully submitted,

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EXHIBIT A

The members of PLAC are: American Home Products Corporation; American Telephone & Telegraph; AMOCO Corporation; Anheuser-Busch Companies, Inc.; Automobile Importers of America, Inc.; The Budd Company; Caterpillar, Inc.; Chrysler Corporation; Clark Material Systems Technology Company; The Coleman Company; Dana Corporation; Dow Chemical Company; Eaton Corporation; Exxon Corporation; Federal-Mogul Corporation; FMC Corporation; Fiat Auto U.S.C. and Ferrari, N.A.; Ford Motor Company; Fruehauf Corporation; General Electric Company; General Motors Corporation; Goodyear Tire & Rubber Co.; Great Dane Trailers, Inc.; Harnischfeger Industries, Inc.; Honda North America, Inc.; Hyundai Motor America; Johnson Controls; Kawasaki Motors Corporation, U.S.A.; Merck & Co., Inc.; Mitsubishi Motor Sales of America; Monsanto Company; Motor Vehicle Manufacturers Association of the United States, Inc. and its members; Navistar International Transportation Corp.; Nissan Motor Corporation, U.S.A.; Otis Elevator Company; PACCAR, Inc.; Playtex, Inc.; Porsche Cars North America, Inc.; The Procter & Gamble Company; RJR Nabisco, Inc.; Rockwell International; Saab-Scania of America, Inc.; Squibb Corporation; Strum, Ruger and Company; Subaru of America, Inc.; TRW, Inc.; Toyota Motor Sales, U.S.A., Ltd.; U-Haul International; Union Carbide Corporation; UNOCAL 76; U.S. Tobacco; USX Corporation; Volkswagen of America, Inc.; Volvo North America Corporation; Jervis B. Webb Company; Yamaha Motor Corporation U.S.A.